Supreme Court, U.S.
FILED

03 921 DEC 23 2003

No. _____

In The

# Supreme Court of the United States

Evans Koukios, d/b/a Scientific Information Systems

**Petitioner**

**v.**

Michael Ganson, L.P.A./Mr. Michael Ganson;
Graydon, Head and Ritchey, L.L.P/Mr. Harry J. Finke;
Cincinnati Bar Association /Mr. Edwin W. Patterson III

**Respondents**

**ON PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT AND THE HAMILTON COUNTY FIRST DISTRICT COURT OF APPEALS**

## PETITION FOR WRIT OF CERTIORARI

**Evans Koukios**
**Pro Se**
**4260 McNay Court**
**West Bloomfield**
**Michigan 48323**
**248-538-4588**

## QUESTION AND ARGUMENT FOR GRANTING WRIT

**Does the supremacy clause of the United States Constitution, Article VI, Sec. 2 and 3, impose a duty on states to regulate the conduct of their attorney bars to a standard, definable by the United States Supreme Court, to protect the supremacy clause that is protecting all United States statutory and constitutional rights, and is the United States Constitutional right of self representation being adequately protected in civil litigation in Ohio's courts.**

## PARTIES TO THE PROCEEDING

### Petitioner

Evans Koukios, d/b/a Scientific Information Systems

### Respondents

Michael Ganson, L.P.A./Mr. Michael Ganson;
Graydon, Head and Ritchey/Mr. Harry J. Finke;
Cincinnati Bar Association /Mr. Edwin W. Patterson III;

## TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

PARTIES TO THE PROCEEDING.....ii

TABLE OF CONTENTS.....iii

TABLE OF APPENDIX ..... iv

TABLE OF AUTHORITIES.....vii

OPINIONS BELOW.....viii

JURISDICTION.....viii

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....ix

STATEMENT OF THE CASE.....1

FACTUAL BACKGROUND..... 2

QUESTION AND ARGUMENT FOR GRANTING WRIT..... 8

CONCLUSION.....27

**APPENDIX**

Appendix A: Order of First District Court of Appeals, April 2, 2003, page 1a.

Appendix B: Order of the Hamilton County Court of Common Pleas denying motion for findings of fact and vacation of order of December 17, 2001 and requiring bond of $106,002.64 and $39,103.08, entered January 16, 2002, page 6a.

Appendix C: Order of Hamilton County Court of Common Pleas entering for $19,551.54 for attorneys fees to Michael Ganson, L.P.A., entered December 20, 2001, page 8a.

Appendix D: Order of Hamilton County Court of Common Pleas entered order for $53,001.32 to GHR, LLP, entered December 20, 2001, page 9a.

Appendix E: Order Granting summary judgment with no reasons appearing in the grant, entered Nov. 2, 2001, page 11a.

Appendix F: Order Granting Motion to Dismiss with no reasons appearing in the grant, entered September 18, 2001.

Appendix G: Order Granting Motion to supplement motion for summary judgment after hearing for Civil Rule 56 motion, entered November 2, 2001, page 13a.

Appendix H: Filing made concurrently in the United States District Court, Southern District of Ohio, first

page, of Fed.R.60(B) motion and Notice of the Removal from the Hamilton County Court of Common Pleas, filed with the Clerk of Hamilton County on November 20, 2001, page 14a.

Appendix I: Sua sponte order finding frivolous conduct, entered Nov. 2, 2001, page 16a.

Appendix J: Order of the Hamilton County First District Court of Appeals entered March 21, 2001, decision with regard to first appeal, page 18a, dismissing CBA on basis of res judicata and reversing dismissal of Ganson.

Appendix K: Order denying motions to compel and motion for defendants to answer the complaint, entered August 14, 2001, page 22a.

Appendix L: Entry of Disqualification of Judge Mark Schweikert for reason of membership in the Cincinnati Bar Association, September 10, 1999, page 26a.

Appendix M: Entry of decision of Chief Justice of Ohio Supreme Court on bias and prejudice of Judges of the First District Court of Appeals, entered October 17, 2000, in first appellate case. Page 28a.

Appendix N: Entry of decision of Chief Justice of Ohio Supreme Court on bias and prejudice of Judge Robert Ruehlman, entered July 19th, 2001, page 30a.

Appendix M: Entry of dismissals on basis of Civ.R. 12(b)(6) for res judicata from previous federal dismissals, entered June 22, 2000.

Appendix P: Order of U.S. Sixth Circuit Court of Appeals, October 12, 2000, from federal action.

Appendix Q: Order of U.S. Sixth Circuit Court of Appeals, August 11, 2000, opinion from federal action, page 36a.

Appendix R: Order and opinion of U.S. Sixth Circuit Court of Appeals on appeal of Fed.R. 60(b) and remand order of the district court on March 4, 2002, entered November 4, 2002, page 42a, and award of attorneys fees to CBA, that was subsequently never enforced.

Appendix S: Order of U.S. Sixth Circuit Court, en banc, denying review, entered March 24, 2003.

Appendix T: Order of Ohio Supreme Court denying stay of judgment entry of Hamilton County First District Court of Appeals, entered June 11, 2003, page 47a.

Appendix U: Order of Ohio Supreme Court denying discretionary review, finding no substantial constitutional question, entered July 30, 2003, page 48a.

Appendix V: Order of Ohio Supreme Court denying motion to reconsider, filed September 24, 2003, page 49a.

Appendix W: Order of U.S. Magistrate Judge, filed June 10, 1998 in federal action but filed in state court action by defendant Ganson and incorporated in order of trial court granting res judicata. Page 50a.

Appendix X: Order of U.S. District Court judge, filed by CBA in state court action, and incorporated in trial court's 12(b)(6) dismissal on basis of res judicata, entered March 17, 1999, page 72a.

Appendix Z: Transcript of Dec. 17, 2001 proceeding in the state court before Judge Robert Ruehlman, who proceeded in the state court with Ganson, GHR and CBA, despite removal and appearance of counsels for these defendants in U.S. District Court to file for order of remand that was not issued until March 4, 2002, said order being appealed to the U.S. Sixth Circuit Court of Appeals. Page 89a.

## TABLE OF AUTHORITIES

Fourteenth Amendment to the United States Constitution, U.S.C. § 1983, page 9

U.S. Constitution, Article VI, Sec. 2 and 3, page 7, 9

Fed.R. 26(a)(f), page 10

U.S.C. # 1367(a) and (d), page 11

*Jinks v. Richland County*, 123 S. Ct. 1667, page 12
, U.S. Const., Art. I, § 8, cl.

*Faretta v. California* , 422 U.S. 806 (1975), page 18

*Semtek Int'l Inc. v. Lockheed Martin Corp.* (99-1551) 531 U.S. 497 (2001), page 12

*Iowa Central Ry. Co. v. Bacon* (1915), 236 U.S. 305, 35 S.Ct. 357, page 16

28 U.S.C. 1441, 1446, page 16
*Ohio v. Robinette* (95-891), 519 U.S. 33 (1996), page 26

*R.I.& P.R. Co. v. Stude*, 346 U.S. 574, page 27

## OPINIONS BELOW

The order of the First District Court of Appeals of Hamilton County Ohio, entered April 2, 2003, printed in Appendix A, that is the final court in the state to enter an order on the record of this case.

The orders of the lower trial court are printed in the Appendix, as well as the orders of the Ohio Supreme Court with respect to its rulings of bias and prejudice entered in the case, as well as federal opinions incorporated by the trial court in its initial rulings of the res judicata effect of a prior federal court action in the United States District Court, Western Region of Ohio and the decisions of the U.S. Sixth Circuit Court of Appeals.

## JURISDICTION

The order denying discretionary review was entered by the Ohio Supreme Court on July 30, 2003 (App. U) from the judgment of the Hamilton County First District Court of Appeals entered on April 2, 2003 (App. A). A motion for rehearing was timely filed with the Ohio Supreme Court, which motion was denied on September 24, 2003 (App. V). Petitioner states that the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257, to review this petition for certiorari.

Petitioner further states that 28 U.S.C #1291 and 28 U.S.C. #1447(d), that incorporates section 1443 of the U.S. Code providing that "...an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise", is additionally applicable to the instant appeal.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### U.S. Constitution, Article VI, Sec. 2 and 3 :

This Constitution, and the Law of the United States which shall be made in Pursuance thereof; ...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding...and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution....

### U.S. Constitution, First, Fourth, Fourteenth Amendments

### 42 U.S.C. § 1983

### U.S. Constitutional Right of Self Representation

### Pertinent Sections of the State of Ohio's Attorney Disciplinary Code and Rules of Governance of the Bar

### Federal Removal Statutes

## STATEMENT OF CASE

This case began on October 10, 1996 when Petitioner, Evans Koukios, filed a complaint in the United States District Court against four defendants involved in the judicial system of the State of Ohio. These were two law firms and lawyers, Michael Ganson, L.P.A. and Michael Ganson and Graydon Head and Ritchey (GHR) and Mr. Finke; the Cincinnati Bar Association (CBA) and its bar counsel Edwin Patterson; and the Ohio Supreme Court Office of Disciplinary Counsel (ODC) and investigator Sally Ann Stuek. In April, 1999, a second action was commenced in the Hamilton County Court of Common Pleas, against all original defendants with the exception of the ODC, and it is from two pre-trial dismissals on Ohio Rule 12(b)(6) against Defendant Ganson and the CBA, and a dismissal on Ohio Rule 56 for summary judgment for defendant GHR, plus the award of $75,000 in attorneys fees pursuant to O.R.C.
2323.15 from which this appeal rises to the U.S. Supreme Court.

For failure of this pro se Petitioner's ability to post a bond for $145,000, execution on his Cincinnati home was commenced by the defendant parties, and the transfer of its assets for the purchase of Petitioner's new home in Michigan was interfered with by these defendant members of Ohio's authorized bar. All defendant parties were required under Ohio law, Gov.Bar.R III, to carry mandated malpractice insurance, that only GHR disclosed at a deposition of Mr. Finke in October, 2001, after it had filed its motion for summary judgment. Mr. Finke revealed a deductible of $875,000 and no separation of assets by the firm in a certificate of deposit or otherwise to satisfy the requirements of Gov.Bar.R. III for the authorized practice of law as a limited liability partnership or legal professional association, and for the protection of its clients, including Petitioner, from the firm's malpractice.

## FACTUAL BACKGROUND

Koukios was the sole proprietor of a computer software business and had Marketing Dynamics, Inc. (MDI) as a client from 1980 to 1990. Pursuant to a contract in 1990, Koukios installed a new computer and software system. The relationship abruptly ended and MDI had a balance of $42,860 on its account. Having never previously utilized legal services, Koukios investigated hiring an attorney and in 1991 retained counsel that filed suit in the Hamilton County Court of Common Pleas, Cincinnati, Ohio, in October 1991.

From the time of his first engagement with the legal system in 1991, however, Koukios began to notice that the conduct of attorneys he met was unethical. A lawyer referred to him by the CBA's Lawyer Referral Service, on hearing Koukios' presentation of the facts, suggested telling a different version. The attorney lacked integrity.

Koukios' observations of Defendant Ganson, the opposing attorney in the litigation, began when Ganson filed a counterclaim that included a punitive count for $90,000. Such a claim, unsupported in Ohio law, could only engender ill will. Koukios noted that Mr. Ganson withheld discovery, claimed a competitor then servicing Koukios' proprietary software was hired in anticipation of litigation, opposed amendment of Koukios complaint by Defendant Finke to protect Koukios' trade secrets, and noted that Mr. Ganson began using the words "extortion" and "fraud" with respect to Koukios in letters and court filings.

Koukios became concerned about the defamatory remarks made by a lawyer and asked Defendant Finke to send a letter to Mr. Ganson and remind him of his professional responsibilities. Mr. Finke, however, advised that Mr. Ganson's remarks were not actionable. Koukios then witnessed Mr. Ganson serve with stealth by the county sheriff, two weeks before the scheduled trial, defamatory trial subpoenas on all of Koukios' other clients. Distraught, Koukios contacted the CBA to file a grievance, but was told by the telephone receptionist that the CBA would not take a grievance from an opposing litigant.

Koukios was advised that his complaint could be voluntarily dismissed and refiled in a single action, and Koukios then witnessed Mr. Ganson proceed to trial on his counterclaim, after agreeing on the record before the visiting trial judge that his counterclaim could be independently adjudicated. Then Koukios witnessed Mr. Ganson appear in the refilled action to argue that the claim dismissed without prejudice was really compulsory to the counterclaim.

At the trial on the counterclaim, Koukios witnessed Mr. Ganson's expert contradict his deposition testimony, and after a ten-day trial witnessed Mr. Ganson illegally garnish $9,000 from Koukios' business account on a false affidavit that included $3,400 in un-awarded deposition costs. Koukios witnessed Mr. Ganson purloin from the court reporter a fee in excess of $2,000 by having two high school youth impermissibly copy the transcript of the trial so that he could prepare his client's brief on appeal and cross appeal.

Finally Koukios witnessed appellate judge Bettman visibly upset at oral argument with Mr. Ganson for having included in his brief a trial court opinion overturned by the Ohio Appellate and Supreme courts. Koukios, greatly disturbed by an intent to falsely persuade a tribunal, filed a grievance with the CBA despite its policy. The CBA's bar counsel, Defendant Mr. Patterson, responded by letter saying that the CBA could not take the grievance because of its policy of not taking grievances from opposing litigants.

Koukios became independently aware of the Office of Disciplinary Counsel and filed a complaint at that office. Sally Ann Steuk investigated the complaint and informed Koukios by letter that since no judge had found any problems with Mr. Ganson's conduct, the grievance would be dismissed. However, sanctions were never requested by Mr. Finke.

Mr. Ganson's judgment on the counterclaim was modified on appeal for being against the manifest weight of the evidence and the 1992 garnishment became more excessive and more than $6000 was returned to Koukios, but a balance remained on deposit with the court from the original garnishment. On a subsequent appeal, an appeals court panel noted for the first time that the garnishment was wrongful in nature, but the trial court refused to provide a hearing and the appellate court affirmed that decision, finding no abuse of discretion.

As the state court would not provide a hearing and the ODC and Ms. Steuk's policy for determining misconduct depended on a hearing by the state court,

the unpublished and confidential custom of the state was that it was impossible to discipline Mr. Ganson, no matter what violation of the disciplinary rules occurred in the state court litigation. Nothing was prejudicial to the administration of justice in Hamilton County Ohio.

Mr. Ganson then made a private threat to retaliate against Koukios and Koukios communicated this information to the CBA. Bar Counsel and Defendant Patterson acknowledged receipt of Koukios' letter, but took no action. In September 1996, Mr. Ganson had the $2,000 remaining on deposit with the court released to him, and he deposited the Clerk's check into his attorney accounts. Mr. Ganson did not, however have MDI as a client. They had been damage so greatly by Mr. Ganon's legal bills that they were foreclosed upon by creditors.

Koukios filed suit in the federal district court on October 10, 1996 and during the pendancy of the federal court action, Mr. Ganson started a new garnishment against Petitioner to collect interest. Koukios filed a supplemental complaint asking for an order to the Supreme Court of Ohio to show cause why Mr. Ganson should not be disqualified from the state previous court proceedings, as there was now evidence in the federal district court's record that Mr. Ganson was proceeding in state court without a client. The Supreme Court of Ohio, ODC, opposed Koukios' supplemental pleading, stating that Koukios was not entitled to an appeal of his earlier grievance.

Mr. Ganson then started contempt proceedings to have Mr. Koukios appear at a judgment debtor's exam and Koukios filed a second supplemental

complaint asking for an order against Mr. Ganson to cease and desist from violating the attorney disciplinary code and from taking any actions that would harass or injure Mr. Koukios or his family. This supplement was again opposed **and Koukios was incarcerated by Hamilton County sheriffs to compel his appearance before Mr. Ganson, which could not occur, because Mr. Ganson had no client**. Mr. Ganson brought the administration of justice into disrespect by violating disciplinary rules and violating Koukios' U.S. Fourth Amendment rights with yet more false affidavits.

There was no protection from the federal forum. Subjects of Plaintiff's first, second and third supplements to his federal complaint related to Mr. Ganson's conduct as a rogue attorney, committing attorney misconduct in the presence of the federal district court and interfering with a party and witness in a federal proceeding. Defendants GHR and Mr. Finke, Defendants Mr. Patterson and the Cincinnati Bar Association, Defendants the Supreme Court of Ohio, Office of Disciplinary Counsel, and the Attorney General of the State of Ohio, all state actors, did nothing to prevent the constitutional infarctions of Mr. Ganson.

There was nothing private about Mr. Ganson's conduct. It was destined by the widespread policies of the State of Ohio not to discipline attorneys to any standard of protecting constitutional rights of U.S. citizens, to the degree that actually entering the state of Ohio's judicial system acted to cancel protections of Supremacy Clause of the United States constitution. It was the widespread custom of the Ohio courts to

permit conduct prejudicial to the administration of justice.

Koukios would not file another disciplinary grievance with the CBA or the ODC. Being retaliated against for being a witness of attorney misconduct had a chilling effect, and being told by a U.S. District Court and the U.S. Sixth Circuit Court of Appeals that Petitioner had no legal standing under any federal statute or the U.S. Constitution to require states to regulate the conduct of any attorney to any constitutional standard was even more chilling. It led to infarctions of major constitutional proportions and unmitigated bar brutality against a defenseless pro se litigant attempting to exercise his U.S. Constitutional right of self-representation.

It is the rights of the supremacy clause of the U.S. constitution and the U.S. Constitutional right of self representation that brings this appeal to the United States Supreme Court. As referred to by the Magistrate Judge in his report in the federal proceeding, Appendix W:

> Assuming *arguendo* that plaintiff has standing to assert a claim against Steuk and ODC for failing to impose disciplinary measures against defendant Ganson, such a claim fails to allege a violation of a federal constitutional right. "License to practice law, the continuation of such license, regulation of the practice and procedure for disbarment and discipline are matters that are within the province of an individual state." *Saier v. State Bar of Michigan*, 293 F.2d 756, 758 (6th Cir. 1961), *cert. denied,* 368 U.S. 947 (1961). It is undisputed that the Ohio Supreme Court has original jurisdiction in the regulation of attorney practice and discipline. Ohio Const. Art. IV, § II(B). Plaintiff has no right under the Federal Constitution to require that the Supreme Court of the State of Ohio or the ODC process his complaint against attorney Ganson. *Id.* at 759. *See also Blanton v. United States,* 96 F.3d 227, 233

(6th Cir. 1996) (consistent with principles of comity and federalism, lower federal courts lack jurisdiction to review state court proceedings, including matters involving attorney licensure or discipline). Thus, apart from certiorari by the United States Supreme Court, federal courts have no power to review the adjudicative determination by the Ohio Supreme Court and the ODC that defendant Ganson's conduct did not warrant disciplinary action. *Blanton,* 94 F.3d at 234. Because the regulation of the practice of law, including disciplinary procedures, is clearly a function of state government, plaintiff's complaint against the ODC defendants, including Steuk, fails to allege any deprivation of a right which would give rise to a cause of action under 42 U.S.C. § 1983. *Saier,* 293 F.2d at 760. Accordingly, any claims against defendants Office of Disciplinary Counsel, the Supreme Court of Ohio and Ann Steuk which are not barred by the Eleventh Amendment should be dismissed under Fed. R. Civ. P. 12(b)(6).

Though the Ohio Const. Art. IV, § II(B) gives the authority of the people to the Ohio Supreme Court to regulate the practice of law, the facts are that the Ohio Supreme Court is abusing the authority given to it by the people, now causing the issue to rise for a second time to the U.S. Supreme Court, but now through the state court and coupled with both the violation of the Supremacy Clause and the U.S. Constitutional right of self representation to show that a section 1983 violation indeed exists. The jurisdiction of the U.S. Supreme Court is proper on the record of this case on the question presented.

## QUESTION AND ARGUMENT FOR GRANTING WRIT

**Does the supremacy clause of the United States Constitution, Article VI, Sec. 2 and 3, impose a duty on states to regulate the**

**conduct of their attorney bars to a standard, definable by the United States Supreme Court, to protect the supremacy clause that is protecting all United States statutory and constitutional rights, and is the United States Constitutional right of self representation being adequately protected in civil litigation in Ohio's courts.**

U.S. Constitution, Article VI, Sec. 2 and 3 reads in part:

> This Constitution, and the Law of the United States which shall be made in Pursuance thereof; ...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding...and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution. . . .

Though the Fourteenth Amendment and 42 U.S.C. § 1983 refer to limits of state conduct, this section of the United States Constitution places an additional duty on states to bind "all executive and judicial Officers" to support the Constitution of the United States. Moreover, the clause itself places the supreme law of the land in federal law, overriding any law states may make to regulate the affairs of their citizens.

This provision does not require the Constitution and the United States law to speak to every facet of social interaction but it does, however, specifically apply to the

decision-making and conduct of executive and judicial officers such that it is regulated within the bounds of the United States Constitution. Attorney and judicial professional codes of ethics provide a regulation of judicial officers.

Nothing "in the Constitution or Laws of any State to the Contrary" can override the duty of a state to the U.S. Constitution and laws. It comes as no surprise that judges and attorneys take an oath to support the United States Constitution. It is constitutionally required. What remains is the question of the obligation imposed on states to bind their executive and judicial officers by their oath.

The Magistrate Judge originally assign in the federal proceeding recused without explanation, but the undisclosed reason was that he was or had recently been the President of the Cincinnati Bar Association that had a grievance committee for taking grievances from the public about judicial and attorney misconduct. Counsel for the CBA and Defendant Mr. Patterson, failed to disclose the conflict of the Magistrate judge, who recused only after three months had elapsed, when the scheduling conference, initial disclosures and discovery was to commence according to federal rules. Fed. Rule 26(a) and (f) stated:

> Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f)....Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a

> scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed discovery plan.

None of the federal attorneys representing their legal clients, nor the newly assigned Magistrate judge who had just assumed his position after having been a state court judge in the Hamilton County Court of Common Pleas, observed the federal rule to begin discovery, which was the next of many abuses of the federal and state rules of civil procedure instigated by the legal defendants' attorneys.

On March 17, 1999, the federal district court, without ever once meeting with the parties, dismissed the well pled pro se complaint and Koukios commenced a state court action within 30 days of the dismissal to retain congressional protection of the state court claims under 28 U.S.C §1367(a) and (d) which provides in part:

> ...in any civil action in which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

This Court recently reversed the South Carolina Supreme Court on its abrogation of the Congressional protections of this statute because Congress has authority to

make laws that are necessary and proper for carrying out its Article I powers and other constitutional powers vested in the federal government, a result that is necessary to assure that federal tribunals may fairly and efficiently exercise the judicial Power of the United States, Art. III, §1. See *Jinks v. Richland County*, No. 02-258, 123 S. Ct. 1667, 155 L. Ed. 2d 631, 2003 U.S. LEXIS 3241, 71; U.S. Const., Art. I, § 8, cl. 18.

So that federal protections would not be abused by defendants' counsel in the state action, Petitioner incorporated his first amended federal complaint into his state court complaint to plead with particularity the facts of his supplemental state law claims, and additionally attached a docket statement from the federal proceeding as evidence of the tolling protection. Defendants Ganson and the CBA, however, both improperly filed Civ.R.12(b)(6) motions to dismiss, claiming res judicata from the federal dismissal, without raising the issue as an affirmative defense. They attached and/or filed the federal Magistrate judge's report and the district judge's March 17, 1999 decision dismissing the action, (in the Appendix) to further abuse the adjudicative process, as the allegation in Plaintiff's complaint was that it was the unconstitutional custom of the state to permit the raising of res judicata without providing the proper notice and hearing required in the U.S. Constitution.

In *Semtek Int'l Inc. v. Lockheed Martin Corp.* (99-1551) 531 U.S. 497 (2001), this court protected claim preclusive effects in state courts from federal dismissal rules that could be interpreted to deny state court protections, but in the facts of the instant case, the Court sees more insidious procedural problems, to where congressional intent is frustrated when a litigant 1) stays in the federal forum to appeal, 2) enters the state forum to pursue state law claims, and/or 3) returns to the federal forum via Fed.R. 60 and the

removal statutes when new federal claims arise in the state court action.

Here, Petitioner did not and could not abandon his federal claims, filing an appeal to the Sixth Circuit Court of Appeals from the U.S. District Court's final order, and this court denied certiorari in case 00-1120 on February 20, 2001, rehearing denied April 16, 2001. During the two year period, appeals were required in the state court system for the unconstitutionally sought and granted motions to. The state appellate court concluded on the first state court appeal that the federal judgment was preclusive as to defendant CBA but not preclusive as to defendant Ganson, and the supposedly supplemental state law claims were stayed without discovery nearly five years despite the congressional intent for efficiency in resolving state court claims pled in federal actions.

The problems in the instant case in both forums were seen to merge, however, when the initial state court judge assigned recused for the same reason that the initial federal magistrate judge recused, for the reason that he was a member of the Cincinnati Bar Association. See Appendix. To Judge Schweikert, resolution of the issues by any member of the Cincinnati Bar Association was problematic and would have the appearance of impropriety. To the Ohio Supreme Court, membership in the Cincinnati Bar Association, a party that frequently appears before the Ohio Supreme Court, was no problem. See Appendix and decisions of Chief Justice Moyer.

Allegations in the complaint that Petitioner was a witness of attorney misconduct, that he was unable to file a grievance because of a policy of the CBA, that collusion existed in the CBA grievance process to limit the liability of the other attorney defendants, and that Petitioner was being openly retaliated against by members of the Cincinnati Bar

Association, were troubling to the judicial member of the Cincinnati Bar Association who recused. The recusal is reminiscent of remarks by Justice O'Connor in a persistent theme of her public writings and remarks, as in a speech to the American Bar Association that was reported in the Cincinnati Enquirer in December 1993, citing the problem of driving away members of the legal profession who have a sense of ethical responsibility that includes civility and an inability to tolerate the "brutish" climate of civil litigation:

> She cited others who predict the practice of law in the 1990s 'will be nasty, brutish and, for some, short' and said such an atmosphere is bound to drive from the legal profession many of its best people. Too many lawyers approach the law as if they were in battle or at war, O' Connor said, adding that a common objection to civility is (that) it will in some way disserve the client. Civility is hard to codify or legislate 'without a fundamental change in attorneys' conscience'.

To complicate resolution of any state law claims against the CBA, the federal court had ruled there was no right in federal law to compel the Cincinnati Bar Association not to breach its fiduciary duty to grievants and the public, to act civilly and not at war, and the federal courts found thereby that the standards for lawyer integrity could only be determined by lawyers and not the lay public. Moreover, all lawyers engaged in administering their fiduciary duties to grievants had absolute immunity from any liability.

The court is referred to Appendix R and S, where the CBA went so far as to burn this notion of immunity into U.S. Sixth Circuit Court of Appeals by its finding that a challenge to the notion of immunity is entirely frivolous and will be sanctioned by the award of attorney fees to bar associations compelled to raise the immunity defense. Not one member

of the en banc Sixth Circuit on March 24, 2003 had trouble with the following holding of the U.S. Sixth Circuit Court of Appeals:

> We now turn to the CBA's motion for fees and costs. This court may award damages and costs to the appellee if the court determines that an appeal is frivolous, *see* Fed.R.App.P.38, and award attorney's fees if the appeal was frivolous, unreasonable, or without foundation. *Wrenn v. Gould*, 808 F.2d 493, 505 (6th Cir. 1987)(citing *Christiansburg Garment Co. v. EEOC*, 434, 434 U.S. 412,421 (1978)). In this case, the district court ruled that the CBA was immune from suit, this court affirmed that decision, and the district court properly denied Koukios's most recent Rule 60 motion. Koukios's appeal is unreasonable and unfounded because he has raised no legitimate grounds to challenge the district court's decisions.
>
> For the foregoing reasons, we deny Koukios's motions, grant the CBA's motion for fees and costs, and affirm the district court's order. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

One week later, on April 2, 2003, the Hamilton County First District Court of Appeals, as shown in Appendix A, affirmed the award of $75,000 in attorneys fees to defendants GHR and Ganson. This was hardly a "reasonable fee" for services in filing a pretrial motion to dismiss by Ganson and a motion for summary judgment by GHR with an 8 sentence affidavit of the alleged negligent attorney claiming himself as his own expert witness on his malpractice.

The state appellate court opinion is more disturbing in that it fails to reveal that the bulk of the "reasonable fees"

were not for proceedings in the state court before the trial court judge who had only been assigned to the case for six months, but for the proceedings in the federal court, including attorneys fees by members of this U.S. Supreme Court's bar to defend against certiorari on the constitutional issues in Petitioner's federal complaint. These attorneys fees from federal forums are all federal question issues, over which only federal courts should have jurisdiction.

The Hamilton County Court of Common Pleas, even cited the U.S. Supreme Court in *Iowa Central Ry. Co. v. Bacon* (1915), 236 U.S. 305, 35 S.Ct. 357 as authority for the process of validating the taking of Petitioners property on the hearing date of December 17, 2001 in the state court, when the claims for attorneys fees that were spawned *sua sponte* by a very biased and prejudiced state court judge had been properly removed by Petitioner, with no procedural errors, to the U.S. District Court. The state appellate court held, in seeming total disregard to the supremacy clause and Petitioner's pro se rights:

> Pursuant to Sections 1441 and 1446, Title 28, U.S. Code, only the defendant may remove a case to federal court. See *Fox. v. Stames* (Dec. 8, 1989), 11th Dist. No. 88-L-13-192; see also, *Gargallo v. Brown* (May 3, 1977), 10th Dist. Nos. 76AP-986 and 76AP-993 ("Filing a petition for removal to Federal Court does not divest a state court of jurisdiction unless the petition for removal sets forth some basis which could constitute grounds for removal. Here, nothing was set forth in the petition for removal which would have effectuated removal, since plaintiff was seeking removal of his own case to the Federal Court.") Proceedings in the state court subsequent to the petition for removal are valid if the suit was not removable. See *State ex rel Ervin v. Gilligan* (June 12, 1973), 10th Dist. No. 72AP-47, citing *Iowa Central Ry. Co. v.*

*Bacon* (1915), 236 U.S. 305, 35 S.Ct. 357. A purported petition for removal that does not set forth any valid grounds for removal does not deprive the state court of jurisdiction. See *Bd. of Trustees for Memorial Civic Ctr. v. The Carpenter Co.* (Aug. 9, 1982), 3rd Dist. No. 1-81-38. Therefore, the trial court did not lose jurisdiction, because Koukios, as the plaintiff, did not file a valid petition for removal.

The trial court has the authority to award reasonable attorney fees incurred by any party adversely affected by frivolous conduct. See *Ron Scheider & Assocs. v. London*, 81 Ohio St.3d 94, 1998-Ohio-453, 689 N.E.2d 552. The record supports a finding that Koukios had engaged in frivolous conduct. See *Riston v. Butler*, 149 Ohio App.3d 390, 2002-Ohio-2308, 777 N.E.2d 857. We hold, therefore, that the trial court did not abuse its discretion in awarding attorney fees to Ganson and GHR as sanctions for Koukios's frivolous conduct.

The Ohio Supreme Court saw no constitutional problem in the pronouncement of its appellate court and declined jurisdiction to hear Petitioner's appeal. See Appendix. The U.S. Supreme Court is asked, however, to properly interpret congressional intent and federal removal statutes, for the order of the Hamilton County Court of Appeals certainly must have overreached, just as did the South Carolina Supreme Court in *Jinks v. Richland County, supra.*

Of further relevance to the Supreme Court in the record is a determination of whether on the date of the hearing for attorneys fees, when the moving parties had already appeared in the federal proceeding to seek a remand to the state forum for the adjudication of the alleged damages, they were not acting as rogue federal attorneys

violating the federal statute not to proceed in state court. There was no directive until March, 2002 from the U.S. District Court to remand, and that decision was appealed by Petitioner to the U.S. Sixth Circuit Court of Appeals.

The Notice of Removal in this record is particularly remarkable, however, as it is joined to a motion under Fed.R. 60 that also appears in this state court's record. See Apendix. Thus the U.S. Supreme Court has both the federal record and the state record from which it can decide whether Petitioner's claims belong in the state court or the federal court and what protections, if any, must be afforded this pro se Petitioner under his U.S. Constitutional right of pro se representation.

This and other federal courts have protected pro se parties. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), *Ratliff v. United States*, 999 F.2d 1023, 1026 (6th Cir. 1993). Federal courts have also historically exercised great tolerance to insure that an impartial forum remains available to plaintiffs invoking the jurisdiction of the court without the guidance of trained counsel. Technical rigor in the examination of pro se pleadings is inappropriate. *See Snyder v. Internal Revenue Service*, 596 F.Supp. 240. And most importantly, the right of pro se representation was recognized at the time of the framing of the U.S. Constitution, as described by this court in *Faretta v. California* , 422 U.S. 806 (1975), to provide a constitutional right of self representation:

> In the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation. Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92, enacted by the First Congress and signed by President Washington one day before the Sixth Amendment [422 U.S. 806, 813] was proposed, provided that "in all the courts of the United States, the parties may plead and manage

> their own causes personally or by the assistance of . . . counsel . . . ." The right is currently codified in 28 U.S.C. 1654.
>
> The colonists brought with them an appreciation of the virtues of self-reliance and a traditional distrust of lawyers. When the Colonies were first settled, "the lawyer was synonymous with the cringing Attorneys-General and Solicitors-General of the Crown and the arbitrary Justices of the King's Court, all bent on the conviction of those who opposed the King's prerogatives, and twisting the law to secure convictions." 30 This prejudice gained strength in the Colonies where "distrust [422 U.S. 806, 827] of lawyers became an institution." 31 Several Colonies prohibited pleading for hire in the 17th century. 32 The prejudice persisted into the 18th century as "the lower classes came to identify lawyers with the upper class." 33 The years of Revolution and Confederation saw an upsurge of antilawyer sentiment, a "sudden revival, after the War of the Revolution, of the old dislike and distrust of lawyers as a class." 34 In the heat of these sentiments the Constitution was forged.

The record shows that fairer standards to protect the self-represented in today's uncivil environment of civil advocacy should be visited to expand upon *Faretta*. The bond of $145,000 required of this pro se Plaintiff to bring this appeal to the judges of the United States Supreme Court, to ask for constitutional protection of the right of self representation, speaks to the severe problem of a judiciary and a state's law that is actually hostile and retaliatory to the exercise of the U.S. right.

In Appendix Z, the Court will note that the state court judge refers to Petitioner as a **vexatious litigator** and

recommends to the parties that they take advantage of the new Ohio law that can bar pro se litigants from pursuing claims in Ohio courts. See Mayer v. Bristow (2000), 91 Ohio St.3d 3 where the Ohio Supreme Court finds the entire law constitutional despite the existence in the law of a suspect class of pro se litigants:

1.

1. R.C. 2323.52, the vexatious litigator statute, is constitutional in its entirety.

No citizen represented by an attorney can be found in violation of the statute as attorneys are exempt, where every pro se litigant choosing to represent himself can have suit brought against him by a represented party and be barred from ever filing suit again without permission of the court finding that the pro se party was a **vexatious litigator**. Thus Petitioner can be in violation of the statute, but the defendant parties in this action cannot be.

The names of the "vexatious litigators" and the orders finding them in violation of the law are posted on the Ohio Supreme Court's web site as required by the statute, and the adjudications are frightful. They start as counterclaims, are decided by summary judgment, and show absolutely no respect for the "inviolate" right of jury determination that the lay public should receive when a state takes a constitutionally protected right.

Ohio law is even more hostile to lay person, as the Ohio Supreme Court, under its perceived grant of constitutional authority to regulate the discipline of attorneys, is now come to believe that it can regulate the legal discourse and First Amendment rights of association of the lay public with the establishment of its unauthorized practice of law committees. As an example, see *Cleveland Bar Assn. v. Picklo*, 96 Ohio St.3d 195, 2002-Ohio-3995, where Justice LUNDBERG STRATTON is compelled to dissent on the

usurpation of legislative authority to regulate the conduct of laypersons and monopolize the legal business for attorneys:.

> **{¶1}** I do not agree that the prosecution of a forcible entry and detainer case by a landlord's agent constitutes the unauthorized practice of law. In addition, I would not overturn a state statute without giving notice to the Attorney General in accordance with *Cicco v. Stockmaster* (2000), 89 Ohio St.3d 95, 728 N.E.2d 1066, and *George Shima Buick, Inc. v. Ferencak* (2001), 91 Ohio St.3d 1211, 741 N.E.2d 138.
>
> **{¶2}** In *Land Title Abstract & Trust Co. v. Dworken* (1934), 129 Ohio St. 23, 1 O.O. 313, 193 N.E. 650, this court defined the practice of law as follows:
>
> **{¶3}** "The practice of law is not limited to the conduct of cases in court. It embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law." Id. at paragraph one of the syllabus.
>
> **{¶4}** The actions so defined require specialization, particularized training, and knowledge. Consequently, we have enjoined the unauthorized practice of law when laypersons encroach upon those areas. However, there are certain procedures recognized by the General Assembly that laypersons may lawfully conduct within the judicial system. A board or corporate officer may file a complaint challenging the tax valuation or assessment of the corporation's real property. R.C. 5715.19. A corporate officer may file and present a claim on behalf of a corporation in small claims court. R.C. 1925.17. A landlord may bring an action for forcible entry and detainer. R.C. Chapter 1923; *Miele v. Ribovich* (2000), 90 Ohio St.3d 439, 739 N.E.2d 333. A "landlord" is being defined to include "the owner, lessor, or sublessor of premises, [or] the agent or person the landlord authorizes to manage premises." R.C. 1923.01.

{¶5} Here, respondent was the recognized agent of the landlord authorized to bring a forcible entry and detainer action. At no time did respondent hold herself out as an attorney. She completed a preprinted complaint form. The form required her to fill in the blanks with the name and address of the plaintiff and defendant, the current date, address of the property in question and the amount of the rent past due. I do not believe that such activity constitutes the preparation of pleadings, the managing of litigation, the preparation of a legal instrument or the giving of legal advice. It is a routine, almost rote, procedural mechanism to enforce a statutory remedy for restitution and nonpayment of rent. It requires no legal analysis and no special legal knowledge but merely an ability to read a form and complete the blanks with facts.

{¶6} The ability of laypersons to file and prosecute forcible entry and detainer cases is not unique to Ohio. Other states likewise authorize nonattorneys, including landlords, the agents of landlords, and lessors to file these actions. Tex. Prop.Code Ann. 24.011; Mo. Rev. Stat. 534.070.

{¶7} I also object to the majority's limitation upon the constraints of *Cicco v. Stockmaster*, 89 Ohio St.3d 95, 728 N.E.2d 1066, in a constitutional challenge of a statute. For the reasons set forth in my concurring opinion in *George Shima Buick v. Ferencak*, 91 Ohio St.3d at 1212, 741 N.E.2d 138, I do not believe that *Cicco* should be limited to formal declaratory judgment actions. No matter what the circumstances, whenever the constitutionality of a state statute is challenged, I believe the court is being asked to enter a declaratory judgment. A majority of this court is now, in a case involving the alleged unauthorized practice of law, declaring unconstitutional portions of two statutes that affect all landlords in Ohio without giving proper notice or an opportunity for interested persons to be heard. Our state statutes are entitled to a strong presumption of constitutionality. *State v. Gill* (1992), 63 Ohio St.3d 53, 55, 584 N.E.2d 1200. Despite this principle, and without any debate, this court has struck down the statutes at issue.

{¶8} I believe that today's opinion will result in needless additional expense and burden upon landlords and others enumerated in R.C. 1923.01(C)(2) and R.C. 5321.01(B). Landlords must now retain the services of an attorney in all forcible entry and detainer cases. I do not believe that it is necessary nor is it what the General Assembly intended. Instead I see the court continuing its trend toward monopolizing the legal business in areas where a layperson is qualified as well as statutorily authorized to proceed. I respectfully dissent.

The case of *Cincinnati Bar Assn. v. Bailey* (2000), 90 Ohio St.3d 136 is more frightful, as the Ohio Supreme Court has instituted a climate where its local bar associations are now authorized to police the lay public who might be suspected of engaging in any activities a bar association determines infringes on its monopoly of the practice of law. The syllabus of that case reads:

> Unauthorized practice of law — Formal complaint need not be filed by a local bar association for Board of Commissioners on the Unauthorized Practice of Law to issue a subpoena duces tecum in furtherance of its duty to protect the public from the unauthorized practice of law — Respondent found in contempt of Supreme Court of Ohio, when.

Mr. Bailey is next seen under order of incarceration by the Ohio Supreme Court and the Cincinnati Bar Association, that also demands its attorneys fees:

> **1999-0157. Cincinnati Bar Assn. v. Bailey.**
>
> On April 24, 2003, this court ordered that respondent, Donald L. Bailey, be incarcerated in the Franklin County Jail for a period of 10 days and that the jail time be suspended provided respondent purged himself of contempt.
>
> This court further ordered that movant, Cincinnati Bar Association, file a notice, within 40 days of

the date of the order, informing this court whether or not respondent had reimbursed the Cincinnati Bar Association $375 for attorney fees and whether respondent had fully complied with the subpoena duces tecum issued by the Board of Commissioners on the Unauthorized Practice of Law.

This court further ordered that should respondent, Donald L. Bailey, fail to comply with the order entered April 24, 2003, he shall be incarcerated in the Franklin County Jail for a period of no less than 10 days and as long thereafter as he shall fail to purge himself of the contempt of this court.

On June 3, 2003, movant filed a notice informing this court that respondent had failed to fully comply with the April 24, 2003 order because he had not provided all documents requested in the subpoena duces tecum. Upon consideration thereof,

IT IS ORDERED by the court that Donald L. Bailey shall serve his sentence in the Franklin County Jail beginning on Wednesday, June 25, 2003, for his failure to comply with this court's order of April 24, 2003, and that he shall remain incarcerated until he has purged himself of contempt and this court orders his release.

IT IS ORDERED by the court that a writ of commitment shall be issued commanding the Sheriff of Franklin County to imprison Donald L. Bailey, last known business address in Columbus, Ohio, for a period of no less than 10 days, and as long thereafter as he shall fail to purge himself of the contempt of this court and until this court orders his release.

IT IS FURTHER ORDERED by the court that movant, Cincinnati Bar Association, shall immediately file, by facsimile, a notice with this court upon Donald L. Bailey's compliance with the April 24, 2003 order.

IT IS FURTHER ORDERED by the court that, upon notice by movant that respondent has fully complied with the subpoena duces tecum, this court will suspend respondent's sentence or, if respondent is serving his sentence, will order his release.

**In this legal environment in the State of Ohio today, the lay public in general and the lay pro se public in particular cannot exercise their First Amendment rights of association, discourse, commerse and thought.**

As is evidenced in the record preliminarily shown in the various Appendices attached to this petition, there is no possibility of exercising Petitioners due process rights either in the federal or state forums, and the fault is not with the pro se petitioner's complaint, but with the failure of both the federal and state courts to respect the U.S. Constitution's Supremacy Clause and the U.S. Constitutional right of self-representation.

It is these issues over which this court should take jurisdiction and engage the nations lawyers in a national discourse, perhaps including those law school professors who are teaching ethics to the nation's lawyers, and certainly including the American Bar Association to air these problems. There wasn't one lawyer of the 40,000 lawyers in Ohio that the Ohio Supreme Court could ask to file a brief on behalf of Petitioner's legal concerns. These concerns merit U.S. Supreme Court review.

The Supreme Court's own disciplinary rule is even relevant here, as these same counsels that appeared at the December 17, 2001 hearing, all appeared in the U.S. Supreme Court when pro se Petitioner first appeared to file for Certiorari in the federal action, and Supreme Court rule reads:

> **Rule 8. Disbarment and Disciplinary Action**
> 1. Whenever a member of the Bar of this Court has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this Court, the Court will enter an order suspending that member from practice before this Court and affording the member an opportunity to show cause, within 40 days, why

a disbarment order should not be entered. Upon response, or if no response is timely filed, the Court will enter an appropriate order.

Petitioner believes that when his former attorneys seized his house to satisfy their improperly obtained judgment, the attorneys were all federal attorneys at the time, and their conduct was nothing less than bar brutality:

> No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence.
>
> Ableman v. Booth, 21 Howard 506 (1859)

The state court appellate judges couldn't find a modicum of "conduct unbecoming a member" of the state of Ohio's bar, nor any judicial error, while they in fact reviewed an order that didn't exist, as there is no Ohio statute or rule that states how Ohio judges are to proceed when a notice of removal is filed and no order to that effect was entered in the record besides that of the First District Court of Appeals. At minimum, federal law today pre-empts state law, and if that is the case, certiorari should be granted to revisit *Iowa Central Ry. Co. v. Bacon* (1915), 236 U.S. 305, 35 S.Ct. 357.

*Ohio v. Robinette* (95-891), 519 U.S. 33 (1996), though it regards a criminal rule, also contains principles on point for certiorari, as Justice Ginsburg points out in her concurring opinion regarding an Ohio Supreme Court decision that signals a view permitting each state throughout the 50 states of the nation, to make decisions with respect to procedural propriety of federal removal:

> I write separately, however, because it seems to me improbable that the Ohio Supreme Court understood its first

> tell then ask rule to be the Federal Constitution's mandate for the Nation as a whole. "[A] State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards." Oregon v. Hass, 420 U.S. 714, 719 (1975). [n.*] But ordinarily, when a state high court grounds a rule of criminal procedure in the Federal Constitution, the court thereby signals its view that the Nation's Constitution would require the rule in all 50 States.

Here, the U.S. Supreme Court has already spoken on the issue being dealt with by the Hamilton County First District Court of Appeals, where in *R.I.& P.R. Co. v. Stude*, 346 U.S. 574, the court instructs how federal law determines who is a defendant or plaintiff for federal removal, by the "will" to proceed, which at the time of the filing of Petitioner's removal, rested solely with Ganson, GH&R and the CBA to proceed in the state court:

> But this court must construe the Act of Congress regarding removal. And it is obvious that the word defendant as there used is directed toward more important matters than the burden of proof or the right to open and close. It is quite conceivable that a state enactment might reverse the names which for the purposes of removal this court might think the proper ones to be applied. ..."Therefore, in a broad sense, the railroad is the plaintiff, as the institution and continuance of the proceedings depend upon its will. . . ." 204 U.S. 570 , at 579-580.

## CONCLUSION

The framers of the constitution never intended injury to befall those entering the courts they created. Such injury is, however, demonstrated in this record from the mere, honest pursuit of justice as a self represented litigant.

This record compels the exercise of the Supreme Court's supervisory power. Petitioner's well pled complaint,

the factual record in the deposition of Mr. Finke and the hearing transcript and exhibits from the December 17, 2001 hearing, the Notice of Removal, and the Fed.R. 60(B) motion of the Petitioner, all form the basis for granting review, that is additionally required by congress. Removal jurisdiction claimed under 28 U.S.C #1291 and 28 U.S.C. #1447(d), incorporates section 1443 of the U.S. Code:

> ...an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

Petitioner removed a federal civil rights claim to the United States District Court that demands his right not to be retaliated against for exercising his U.S. constitutional right of self representation, and the United States Sixth Circuit Court of Appeals, as the Appendix shows, would not review the remand order of the federal District Court.

As the Hamilton County Court of Appeals entered an order on the removal petition, but no other court has appeared to review the order of the Court of Appeals including the Ohio Supreme Court, it is now the duty of the United States Supreme Court to fulfill the command of Congress.

Respectfully submitted,

/s/Evans Koukios
Petitioner pro se

## APPENDIX A

**IN THE COURT OF APPEALS**
**FIRST APPELLATE DISTRICT OF OHIO**
**HAMILTON COUNTY, OHIO**

EVANS KOUKIOS, Plaintiff-Appellant vs.
MICHAEL GANSON, L.P.A., MICHAEL GANSON, GRAYDON, HEAD AND RITCHEY, HARRY J. FINKE, CINCINNATI BAR ASSOCIATION and EDWIN W. PATTERSON, III, Defendants-Appellees

APPEAL NOS. C-010659, C-010735, C-020091

**JUDGMENT ENTRY**

**Entered APR 02 2003**

This appeal is considered on the accelerated calendar under App.R. 11.1(E) and Loc.R. 12 and this Judgment Entry shall not be considered an Opinion of the Court pursuant to S.Ct.R.Rep.Op. 3(A).

The first assignment of error, which essentially requests that this court reconsider its Judgment Entry of March 21, 2001, is overruled. Plaintiff-appellant Evans Koukios's request for reconsideration is untimely and lacks any merit.

We also overrule the second assignment of error, which alleges that the trial court erred in granting the Civ.R. 12(B)(6) motion of defendants-appellees Michael Ganson and Michael Ganson, L.P.A. (together, "Ganson") to dismiss Koukios's complaint.

A trial court may dismiss a complaint under Civ.R. 12(B) only where it appears beyond doubt that the plaintiff

can prove no set of facts warranting recovery. See *Taylor v. London*, 88 Ohio St.3d 137, 2000-Ohio-278, 723 N.E.2d 1089, citing *O'Brian v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus. In ruling on a Civ.R. 12(B)(6) motion to dismiss, the trial court is required to presume that all factual allegations of the complaint are true. See *Michell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 532 N.E. 2d 753.

The trial court properly determined that Koukios's constitutional claims failed, because Ganson was not a "state actor" and had not been "acting under color of state law."

The court also properly found that Koukios's claim for malicious prosecution failed, because he could not establish that the prior prosecution terminated in his favor. See *Trussell v. General Motors Corp.* (1990), 53 Ohio St.3d 142, 559 N.E.2d 732; *Norwell v. Cincinnati* (1999), 133 Ohio App.3d 790, 729 N.E.2d 1223.

Koukios's claim for abuse of process was negated by his allegation that Ganson had used a sham legal process. In order to establish a claim for abuse of process, Koukios had to allege that a legal proceeding had been set in motion in proper form and with probable cause and that the proceeding had been perverted to accomplish an ulterior purpose for which it was not designed. See *Yakevich v .Kemp, Schaeffer & Rowe Co., L.P.A*, 68 Ohio St.3d 294, 1994-Ohio-503, 626 N.E.2d 115, paragraph one of the syllabus; *Smith v. A.B. Bonded Locksmith, Inc.* (2001), 143 Ohio App.3d 321, 757 N.E.2d 1242. Koukios effectively negated his claim charging wrongful use of process by alleging that Ganson had "used sham legal process," because R.C. 2921.52(A)(4) defines "sham legal process" as an instrument that is "not lawfully issued."

Finally, the trial court properly dismissed Koukios's claims that Ganson had used sham legal process and had engaged in a pattern of corrupt activity, because the complaint did not set forth sufficient factual allegations to support either claim.

The third and fourth assignments of error, which allege that the trial court erred in awarding attorney fees to Ganson and to Harry J. Finke and Graydon, Head and Ritchey (together, "GHR"), are overruled.

Pursuant to Sections 1441 and 1446, Title 28, U.S. Code, only the defendant may remove a case to federal court. See *Fox. v. Stames* (Dec. 8, 1989), 11the Dist. No. 88-L-13-192; see also, *Gargallo v. Brown* (May 3, 1977), 10th Dist. Nos. 76AP-986 and 76AP-993 ("Filing a petition for removal to Federal Court does not divest a state court of jurisdiction unless the petition for removal sets forth some basis which could constitute grounds for removal. Here, nothing was set forth in the petition for removal which would have effectuated removal, since plaintiff was seeking removal of his own case to the Federal Court.") Proceedings in the state court subsequent to the petition for removal are valid if the suit was not removable. See *State ex rel Ervin v. Gilligan* (June 12, 1973), 10th Dist. No. 72AP-47, citing *Iowa Central Ry. Co. v. Bacon* (1915), 236 U.S. 305, 35 S.Ct. 357. A purported petition for removal that does not set forth any valid grounds for removal does not deprive the state court of jurisdiction. See *Bd. of Trustees for Memorial Civic Ctr. v. The Carpenter Co.* (Aug. 9, 1982), 3rd Dist. No. 1-81-38. Therefore, the trial court did not lose jurisdiction, because Koukios, as the plaintiff, did not file a valid petition for removal.

The trial court has the authority to award reasonable attorney fees incurred by any party adversely affected by frivolous conduct. See *Ron Scheider & Assocs. v. London*,

81 Ohio St.3d 94, 1998-Ohio-453, 689 N.E.2d 552. The record supports a finding that Koukios had engaged in frivolous conduct. See *Riston v. Butler*, 149 Ohio App.3d 390, 2002-Ohio-2308, 777 N.E.2d 857. We hold, therefore, that the trial court did not abuse its discretion in awarding attorney fees to Ganson and GHR as sanctions for Koukios's frivolous conduct.

The fifth assignment of error, which alleges that the trial court erred in granting GHR's motion for summary judgment, is overruled. Expert testimony is required in a legal malpractice case to establish the attorney's breach of the duty of care, except in cases where the breach or lack thereof either is so obvious that it can be determined by the court as a matter of law or is within the ordinary knowledge and experience of laymen. See *McInnis v. Hyatt Legal Clinics* (1984), 10 Ohio St.34d 112, 461 N.E.2d 1295; *Evans v. Moore, Moore & Moore* (June 29, 1994), 1st Dist. No. C-930288; *Economou v. Carpenter* (June 30, 1993), 1st Dist. No. C-920224; *Bloom v. Dieckmann* (1983), 11 Ohio App.3d 202, 464 N.E.2d 187.

GHR filed an affidavit and the deposition of an expert witness in support of its motion for summary judgment. Koukios did not produce any expert testimony showing that a genuine issue of material fact existed. Expert testimony was necessary to support Koukios's claim for legal malpractice. Therefore, the trial court properly granted GHR's motion for summary judgment.

The sixth assignment of error is overruled, because there is nothing in the record to support Koukios's claim that any of the counsel involved in this case engaged in improper conduct warranting disqualification.

The seventh assignment of error is overruled. The Cincinnati Bar Association was dismissed from the action by

the trial court, and this court affirmed the dismissal on March 21, 2001.

Therefore, the judgment of the trial court is affirmed.

Further, a certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

DOAN, P.J, HILDEBRANDT and WINKLER, JJ.

To the Clerk:

Enter upon the Journal of the Court on **APR 02 2003** per order of the Court /s/ Doan Presiding Judge

## APPENDIX B

COURT OF COMMON PLEAS CIVIL DIVISION
HAMILTON COUNTY, OHIO

Evans Koukios d/b/a
Scientific Information Systems, Plaintiff vs.
Michael Ganson, LPA, et. al., Defendants
Case No. A9902104
(Judge Ruehlman)

ORDER AND ENTRY

This matter came before the Court on the Plaintiff's Motion Under Rule 59 and 60 for a New Trial or to Vacate the Orders of December 20, 2001, Awarding Attorneys' Fees and Costs to Michael Ganson, and Michael Ganson, L.P.A. and Graydon, Head & Ritchey and/or to Stay the Execution of These Orders and For Findings of Facts and Conclusions of Law Under Rule 52. For the reasons set forth in the Defendants' memoranda in opposition to said motions and for other good cause shown, said motions, with the exceptions of the Motion to Stay Execution, are hereby OVERRULED.

With respect to the Motion for a Stay of Execution, this Court will grant said Motion and issue a stay of execution once the Plaintiff posts with this Court adequate supersedeas bonds as required by Civil Rule 62(B). The amount of the bonds to be posted are $106,002.64 and $39,103.08, which represent two times the amounts of the judgments from which the Plaintiff is seeking a stay of execution. IT IS SO ORDERED.

**January 16, 2002**

/s/Robert Ruehlman
Robert P. Ruehlman, Judge

## APPENDIX C

COURT OF COMMON PLEAS CIVIL DIVISION
HAMILTON COUNTY, OHIO

Evans Koukios d/b/a
Scientific Information Systems, Plaintiff vs.
Michael Ganson, LPA, et. al., Defendants
Case No. A9902104
(Judge Ruehlman)

JUDGMENT ENTRY AWARDING SANCTIONS AGAINST PLAINTIFF, EVANS KOUKIOS OF ATTORNEY FEES AND COSTS IN FAVOR OF DEFENDANTS MICHAEL GANSON AND MICHAEL GANSON, L.P.A.

As to the matter of sanction against the Plaintiff, Evans Koukios, and pursuant to Ohio Revised Code 2323.51 and Ohio Civil rule 11, this matter came to be heard on December 17, before the Hon. Robert P. Ruehlman, Judge. All parties being noticed and properly apprised of the hearing date according to the Ohio Rules of Civil procedure and ORC 2323.51 and all parties given the right to present evidence in support of their respective positions only Defendants, Michael Ganson and Michael Ganson, L.P.A. and Defendants, Graydon, Head & Ritchey, and Harry J. Finke, were present to submit and present evidence pursuant to Ohio Revised Code 2323.51 in support of sanctions against Plaintiff, Evans Koukios.

Following presentation of evidence by Defendants, Michael Ganson and Michael Ganson, L.P.A., this court granted the award of attorney fees and costs to Defendants Michael Ganson and Michael Ganson, L.P.A. in the amount of $19,551.54.

Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that Plaintiff, Evans Koukios is ordered as sanctions pursuant to Ohio Revised Code 2323.51 and Ohio Civil Rule 11, to pay to Defendants, Michael Ganson and Michael Ganson, L.P.A., $19,551.54 in attorney fees and costs.

IT IS SO ENTERED

**December 20, 2001**

/s/Robert Ruehlman
Robert P. Ruehlman, Judge

## APPENDIX D

COURT OF COMMON PLEAS CIVIL DIVISION
HAMILTON COUNTY, OHIO

Evans Koukios d/b/a
Scientific Information Systems, Plaintiff vs.
Michael Ganson, LPA, et. al., Defendants
Case No. A9902104
Judge Ruehlman

JUDGMENT ENTRY AWARDING SANCTIONS AGAINST PLAINTIFF, EVANS KOUKIOS OF ATTORNEY FEES AND COSTS IN FAVOR OF DEFENDANTS HARRY FINKE AND GRAYDON, HEAD & RITCHEY

As to the matter of sanction against the Plaintiff, Evans Koukios, and pursuant to Ohio Revised Code 2323.51 and Ohio Civil rule 11, this matter came to be heard on December 17, before the Hon. Robert P. Ruehlman, Judge. All parties being noticed and properly apprised of the hearing date according to the Ohio Rules of Civil procedure and ORC 2323.51 and all parties given the right to present evidence in support of their respective positions, only Defendants, Michael Ganson and Michael Ganson, L.P.A. and Defendants, Graydon, Head & Ritchey, and Harry J. Finke, were present to submit and present evidence pursuant to Ohio Revised Code 2323.51 in support of sanctions against Plaintiff, Evans Koukios.

Following presentation of evidence by Defendants, Harry J. Finke and Graydon, Head & Ritrchey, this court granted the award of attorney fees and costs to Defendants Harry J. Finke and Graydon, Head & Ritchey in the amount of $53,001.32.

Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that Plaintiff, Evans Koukios is ordered as sanctions pursuant to Ohio Revised Code 2323.51 and Ohio Civil Rule 11, to pay to Defendants, Harry J. Finke and Graydon, Head & Ritchey, $53,001.32 in attorney fees and costs.

IT IS SO ENTERED

**December 20, 2001**

/s/Robert Ruehlman
Robert P. Ruehlman, Judge

## APPENDIX F

COURT OF COMMON PLEAS CIVIL DIVISION
HAMILTON COUNTY, OHIO

Evans Koukios d/b/a
Scientific Information Systems, Plaintiff vs.
Michael Ganson, LPA, et. al., Defendants
Case No. A9902104
Judge Ruehlman

ENTRY GRANTING DEFENDANTS' MICHJAEL GANSON'S AND MICHAEL GANSON, L.P.A.'S MOTION TO DISMISS

Upon consideration of the Defendants', Michael Ganson's and Michael Ganson, L.P.A.'s Motion to Dismiss, the Court finds that the Motion is well taken and is hereby granted.

Therefore, the Court ORDERS, ADJUDGES AND DECREES that the Motion to Dismiss herein filed by defendants, Michael Ganson and Michael Ganson, L.P.A., and the Complaint against Defendants, Michael Ganson and Michael Ganson, L.P.A., is dismissed at plaintiff's costs. Further, the Court finds that there is no just cause for delay, pursuant to Rule 54(B).

**Date 9-18-01**

/s/Robert Ruehlman
Hon. Robert Ruehlman, Judge

## APPENDIX G

IN THE COMMON PLEAS COURT OF HAMILTON COUNTY, OHIO Civil Division

Evans Koukios d/b/a
Scientific Information Systems, Plaintiff v.
Michael Ganson, LPA, et. al., Defendants
Case No. A9902104
(Judge Robert P. Ruehlman)

ORDER AND ENTRY GRANTING DEFENDANTS HARRY J. FINKE IV AND GRAYDON, HEAD & RITCHEY'S MOTION TO SUPPLEMENT AFFIDAVIT OF HARRY J. FINKE IV

This matter came before the Court on Defendant Harry J. Finke IV and Graydon, Head & Ritchey's Motion to Supplement Affidavit of Harry J. Finke IV. This Court entertained arguments on said Motion on October 31, 2001. For the reasons set forth in said Motion and supporting memorandum and for other good cause shown, said Motion is hereby GRANTED. IT IS SO ORDERED.

Submitted by
David C. Greer, Trial Attorney (#0009090)
Karen T. Dunlevey (#0067056)
BIESER, GREER & LANDIS, LLP
400 National City Center, 6 North Main Street
Dayton, OH 45402-1908 (937)223-3277
Trial Attorneys for Defendants Harry J. Finke IV and Graydon, Head & Ritchey

**Entered Nov 02 2001**

/s/Robert Ruehlman
Judge Robert P. Ruehlman

## APPENDIX H

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF OHIO**
**WESTERN DIVISION**

Evans Koukios d/b/a Scientific Information Systems
Plaintiff vs.
Michael Ganson, L.P.A.
Graydon, Head and Ritchey
Cincinnati Bar Association
Supreme Court of Ohio
Office of Disciplinary Counsel
Defendants

Case No. C-1-983
Case No. A99-02104, Ham. Co.

Judge SPIEGEL

**PLAINTIFF'S MOTION FOR THE DISTRICT COURT TO SET ASIDE ITS ORDERS OF MARCH 17, 1999 PURUSANT TO FED.R.CIV.P. 60**

**AND**

**NOTICE OF THE REMOVAL FROM THE HAMILTON COUNTY COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO, OF CASE A99-02104**

**FILED Nov 30 12:48 P.M.**
**JAMES CISSEL**
**CLERK OF COURT**
**HAMILTON CO. OHIO**

Comes now Evans Koukios and asks this Court to set aside its ORDER of March 17, 1999 that declined

jurisdiction of the instant cause and to take jurisdiction of the claims now pending in a concurrent state court action in the Hamilton County Court of Common Pleas, A99-02104, where the Court, Judge Robert P. Ruehlman, presiding, has ordered that Evans Koukios stand as Defendant for wrongful; process or malicious prosecution against Michael Ganson, L.P.A., Graydon, Head and Ritchey, and the Cincinnati Bar Association.

The reasons for granting this motion and for the concurrent removal of the state court action to this Federal District Court are given in the memorandum below.

(Memorandum Continues)
/s/Evans Koukios

(Certificate of Service Continues)
/s/Evans Koukios

## APPENDIX I

IN THE COMMON PLEAS COURT OF HAMILTON COUNTY, OHIO Civil Division

Evans Koukios d/b/a
Scientific Information Systems, Plaintiff v.
Michael Ganson, LPA, et. al., Defendants
Case No. A9902104
(Judge Robert P. Ruehlman)

ORDER AND ENTRY AWARDING SANCTIONS TO THE DEFENDANTS IN ACCORDANCE WITH CIVIL RULE 11

By *sua sponte* motion, this Court has reviewed the Plaintiff's conduct and filings during the course of this litigation and finds that the Plaintiff has willfully violated Civil Rule 11. The Plaintiff has repeatedly filed motions and documents without good grounds to support said filings. Furthermore, said motions and other documents were filed for purposes of causing delay and harassment to the Defendants.

As a sanction for the Plaintiff's willful and repeated violations of Civil Rule 11, the Plaintiff is hereby sanctioned to repay to each of the named Defendants in this action all reasonable attorney's fees and expenses incurred by them in defense of the Plaintiff's claims.

A hearing will be held on December 17, 2001 to determine the amount owed by the Plaintiff in accordance with this Order and Entry.

IT IS SO ORDERED.

Submitted by
David C. Greer, Trial Attorney (#0009090)
Karen T. Dunlevey (#0067056)
BIESER, GREER & LANDIS, LLP

400 National City Center, 6 North Main Street
Dayton, OH 45402-1908
(937)223-3277
Trial Attorneys for Defendants Harry J. Finke IV and
Graydon, Head & Ritchey

**Entered Nov 02 2001**

/s/Robert Ruehlman
Judge Robert P. Ruehlman

## APPENDIX J

**IN THE COURT OF APPEALS**
**FIRST APPELLATE DISTRICT OF OHIO**
**HAMILTON COUNTY, OHIO**

EVANS KOUKIOS, Plaintiff-Appellant vs.
MICHAEL GANSON, L.P.A., MICHAEL GANSON, GRAYDON, HEAD AND RITCHEY, HARRY J. FINKE, CINCINNATI BAR ASSOCIATION and EDWIN W. PATTERSON, III, Defendants-Appellees

APPEAL NO. C-000542
TRIAL NO. A-990214

**JUDGMENT ENTRY**

This appeal, considered on the accelerated calendar under App.R. 11.1(E) and Loc.R. 12, is not controlling authority except as provided in S.Ct.R.Rep.Op. 2(G)(1).

Plaintiff-appellant Evans Koukios filed a complaint in the common pleas court and incorporated by reference pleadings he had filed in a federal lawsuit against the same defendants. Defendants Michael Ganson, Michael Ganson, L.P.A. (collectively "Ganson"), and Cincinnati Bar Association ("CBA") filed Civ.R. 12(B)(6) motions to dismiss the complaint for failure to state a claim upon which relief could be granted. Ganson and the CBA argued that *res judicata* barred Koukios from relitigating issues that had been resolved in the federal action. The trial court granted the motions to dismiss. Koukios has appealed.

Koukios's first and second assignments of error, alleging that the trial court erred in dismissing his complaint on the basis of *res judicata*, an affirmative defense that is not properly raised in a Civ.R. 12(B)(6) motion, and in

considering material outside the pleadings without proper notice to the parties, are overruled because any error that may have occurred was harmless.

Koukios attached to his complaint, and incorporated by reference, copies of his federal court pleadings. Koukios also attached a copy of the federal court's docket and various other material regarding the federal case. Under these circumstances, Koukios invited any error that may have occurred. Pursuant to the invited-error doctrine, a party will not be permitted to take advantage of an error that he himself invited or induced the trial court to make. See *State ex rel. The V Companies v. Marshall* (1998), 81 Ohio St.3d 467, 692 N.E.2d 198; *State ex rel. Fuqua v. Alexander* (1997), 79 Ohio St.3d 206, 680 N.E.2d 985. Further, the "preeminent purpose" behind the notification requirement is to permit the nonmoving party sufficient opportunity to respond. See *State ex rel The V Companies v. Marshall, supra*; *Petry v. Simon* (1983), 4 Ohio St.3d 154, 447 N.E.2d 1285. The trial court held a hearing on the Civ.R. 12(B)(6) motions, along with several other motions, at which Koukios presented his position. Koukios had sufficient opportunity to respond to the motions and to supplement the record with material in support of his position.

Koukios's third assignment of error, which alleges that the trial court erred in granting the defendants' Civ.R. 12(B)(6) motions to dismiss his complaint for failure to state a claim upon which relief could be granted on the grounds of *res judicata*, is overruled in part and sustained in part.

A trial court may dismiss a complaint under Civ.R. 12(B)(6) only where it appears beyond doubt that the plaintiff can prove no set of facts warranting recovery. See *Taylor v. London* (2000), 88 Ohio St.3d 137, 139, 7623 N.E.2d 1089, 1091, citing *O'Brien v. University Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 327 N.E.2d

753, syllabus. In ruling on a Civ.R. 12(B)(6) motion to dismiss, the trial court is required to presume that all factual allegations of the complaint are true. See *Mitchell v. Lawson Milk Co.* (1998), 40 Ohio St.3d 190, 532 N.E.2d 753.

Under the doctrine of *res judicata*, a final judgment between parties to litigation is conclusive as to all claims that were or might have been litigated. See *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 653 N.E.2d 226; *National Amusements Inc. v. Springdale* (1990), 53 Ohio St.3d 60, 558 N.E.2d 1178. *Res judicata* applies between federal court and state court judgments. See *Rogers v. Whitehall* (1986), 25 Ohio St.3d 67, 494 N.E.2d 1387. A claim litigated to finality in a federal court cannot be relitigated in a state court. *Id.*

In granting the defendants' Civ.R. 12(B)(6) motions to dismiss on the grounds of *res judicata*, the trial court specifically adopted by reference the order of the federal district court. In addressing the CBA's motion to dismiss Koukios's federal complaint, the district court held that Koukios had no standing to assert a violation of his due-process rights on the basis of the CBA's decision not to pursue disciplinary action against Ganson. The federal court also held that the CBA was absolutely immune from suit in its enforcement of the code of conduct. The claims raised against the CBA in Koukios's state court complaint are identical to those raised and ruled upon in federal court. Therefore, Koukios is barred by *res judicata* from pursuing the claims in state court. The trial court did not err in granting the CBA's motion to dismiss the complaint.

Turning now to Ganson, we hold that the claims raised by Koukios in his state court complaint are not barred by *res judicata*. The federal court dismissed Koukios's complaint against Ganson solely on the basis that Koukios could not maintain a cause of action under Section 1983, Title 42, U.S. Code, because Ganson was not a "state actor"

and was not "acting under color of state law." The federal court did not address any of Koukios's state law claims against Ganson. Therefore, Koukios is not barred by res judicata from litigating any state law claims that he may have against Ganson in state court. See *Hattie v. Stark Cty. Dept. of Human Services* (Dec. 20, 1993), Stark App. No. CA 9351, unreported. The trial court erred in granting Ganson's motion to dismiss the complaint on the basis of *res judicata*.

The fourth and fifth assignments of error, which allege that the trial court erred in ruling on the Civ.R. 12(B)(6) motions to dismiss before ruling on Koukios's motions to compel discovery and for sanctions, are overruled.

The management of discovery issues lies within the sound discretion of the trial court. See *State ex re. Daggett v. Gessaman* (1973), 34 Ohio St.2d 55, 295 N.E.2d 659. Absent an abuse of discretion, an appellate court must affirm a trial court's disposition of discovery issues. See *State ex rel. The V Companies v. Marshall, supra*. We hold that the trial court did not abuse its discretion in ruling on the motions to dismiss prior to ruling on Koukios's motions to compel discovery. In addition, we hold that the trial court properly decided the motions to dismiss before deciding Koukios's motions for sanctions, because the motions for sanctions were based upon the defendants' filings of the motions to dismiss.

The sixth assignment of error, alleging that the trial court erred in failing "to take cognizance of facts that would warrant a change of venue," is overruled. Koukios did not move for a change of venue. Koukios essentially asked the court if it could be fair and impartial, and the court answered that it could. There is absolutely no indication in the record that the trial court was biased.

Therefore, the judgment of the trial court is reversed with respect to the granting of Ganson's Civ.R. 12(B)(6) motion to dismiss the complaint on the basis of *res judicata*. The judgment is affirmed in all other respects. The cause is hereby remanded for further proceedings consistent with law and this Judgment Entry.

Further, a certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

GORMAN, P.J., HILDEBRANDT and WINKLER, JJ.

To the Clerk:
**Enter upon the Journal of the Court on 3/21/01 per order of the Court**

/s/ Gorman J.
Presiding Judge

## APPENDIX K

HAMILTON COUNTY COURT OF COMMON PLEAS
HAMILTON COUNTY OHIO

EVANS KOUKIOS D/B/A/ SCIENTIFIC INFORMATION SYSTEMS
Plaintiff-vs-
MICHAEL GANSON, L.P.A.
MR. MICHAEL GANSON
AND
GRAYDON, HEAD AND RETCHEY,
MR. HARRY J. FINKE
AND
CINCINNATI BAR ASSOCIATION
MR. EDWIN W. PATTERSON, III
Defendants

Case No.A99-02104
(Judge Robert Ruehlman)

ENTRY OVERRULING AND DENYING PLAINTIFF'S MOTION TO DISQUALIFY THE LAW FIRM OF TRIONA & LOCKEMEYER, PLAINTIFF'S MOTIONS TO COMPEL, PLAINTIFF'S MOTIONS TO ORDER DEFENDANTS TO FULLY ANSWER PLAINTIFF'S COMPLAINT WITH ITS INCORPORATED PLEADINGS AND TO ORDER A DEFAULT JUDGMENT IN PLAINTIFF'S FAVOR FOR FAILURE TO SO FILE A FULL AND COMPLETE ANSWER, AND PLAINTIFF'S MOTION WITH RESPECT TO BIAS AND PREJUDICE OF THE COURT AND

ENTRY TAKING DEFENDANTS' MICHAEL GANSON, L.P.A.'S AND MICHAEL GANSONS'S MOTION TO DISMISS UNDER CONSIDERATION FOR A DECISION

Upon consideration of the Plaintiff's Motion to Disqualify the law firm of Triona & Lockemeyer, Plaintiff's Motions to Compel, Plaintiff's Motions to Order Defendants to Fully Answer Plaintiff's Complaint With Its Incorporated Pleadings and To Order A Default Judgment In Plaintiff's Favor for Failure to So File a Full and Complete Answer and Plaintiff's Motion with Respect to Bias and Prejudice of the Court, the Court finds that the Plaintiff's Motions are not well taken, and they are hereby denied. These matters having been fully briefed by the parties and came to be heard on July 26, 2001, before the Hon. Robert P. Ruehlman, Judge, and all parties being fully apprised of the premises herein, this Court hereby enters an Order overruling and denying Plainiff's Motion to Disqualify the Law Firm of Triona & Lockemeyer, Ltd., and Plaintiff's Motions to Compel as to Defendants, Michael Ganson, L.P.A., Michael Ganson, Graydon, Head & Ritchey, and Harry J. Finke, Plaintiff's Motions as to Defendenats, Michael Ganson, L.P.A., Michael Ganson, Graydon, Head & Ritchey, and Harry J. Finke, to More Fully Answer Plaintiff's Complaint With Its Incorporated Pleadings and To Order A Default Judgment in Plaintiff's Favor for Failure to So File a Full and Complete Answer and Plaintiff's Motion with Respect to Bias and Prejudice of the Court.

Further, following argument of the parties and having the parties fully briefed, Defendants Michael Ganson, L.P.A. and Michael Ganson's Motion to Dismiss under Civ.R. 12(B)(6), the Court will take under advisement and consideration Defendants' Michael Ganson, L.P.A.'s and Michael Ganson's, Motion to Dismiss and issue a decision within the next two weeks.

Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that Plaintiff's Motion to Disqualify the Law Firm of Triona & Lockemeyer, Plaintiff's Motions to Order Defendants to Fully Answer Plaintiff's Complaint With Its Incorporated Pleadings and To Order A Default Judgment in Plaintiff's Favor for Failure to So File a Full and Complete

Answer, Plaintiff's Motions to Compel and Plaintiff's Motion with Respect to Bias and Prejudice of the Court, are hereby denied and overruled.

IT IS SO ENTERED

/s/Robert Ruehlman
Robert P. Ruehlman, Judge

**ENTERED AUG 14 2001**

HAVE SEEN AND AGREED BY SIGNATURE BELOW:

/s/David Lockemeyer
David S. Lockemeyer 0059188
Attorney for Defendants, Michael Ganson, L.P.A., and Michael Ganson
119 E. Court Street, Suit 402
Cincinnati, Ohio 45202
lockemeyer@trionalaw.com

/s/Rejected Entry
Evans Koukios
D/b/a Scientific Information Systems
3516 Cornell Place
Cincinnati Ohio 45220
*Plaintiff pro se*

/s/Karen T. Dunlevey (per telephone authorization)
Karen T. Dunlevey, Esq.
Bieser, Greer & Landis LLP
400 National City Center
6 N. Main Street
Dayton, Ohio 45402-1906
Attorney for Defendants, Graydon, Head & Ritchey and Harry J. Finke

CC: Felix J. Gora, Esq.

## APPENDIX L

COURT OF COMMON PLEAS
HAMILTON COUNTY OHIO

Evans Koukios Plaintiff
-v-
Michael Ganson, Defendant

Case no. A-9902104

JUDGE MARK SCHWEIKERT

**ENTRY OF DISQUALIFICATION**

Pursuant to provisions of Rule 7e, local Rules of Practice, Judge Mark Schweikert hereby disqualifies himself from Case A-9902104 for the following reason:

Upon further consideration of the issues herein and cognizant that this Court is a member of the Cincinnati Bar Association, and in order to avoid any appearance of impropriety.

/s/Schweikert
Mark Schweikert, Judge

**ENTER SEP 10 1999**

## APPENDIX M

## IN THE SUPREME COURT OF OHIO

EVANS KOUKIOS PLAINTIFF V.
MICHAEL GANSON, ET AL. DEFENDANT

CASE NO. A9902104, C0000542
HAMILTON COUNTY
S.C. NO. 00-AP-096

ENTRY

This affidavit of disqualification filed by Evans Koukios seeks the disqualification of all the judges of the First District Court of Appeals.

Affiant is the plaintiff-appellant in a pending matter in which the Cincinnati Bar Association and a law firm are the defendants-appellees. He asserts the judges of the First District Court of Appeals should be disqualified because their membership in the Cincinnati Bar Association creates a conflict of interest in reviewing the underlying case.

Canon 2 of the Code of Judicial Conduct provides that judges may belong to organizations devoted to improvement of the law and legal system, such as bar associations, provided that they may not serve as an officers or trustees if the organization appears frequently in adversarial proceedings before the judge. Here, the judges indicate that they do not hold office in the Cincinnati Bar Association and do not receive any tangible benefit from their membership that would impact on their ability to be fair and impartial in the underlying proceeding. Based on these facts, I cannot conclude that the disqualification of the judges is warranted to ensure the integrity of the proceedings.

This holding is consistent with *In re Disqualification of Fuerst* (1996), 77 Ohio St.3d 1253, in which the plaintiff in a civil action brought against the Catholic Diocese sought

## APPENDIX N

## IN THE SUPREME COURT OF OHIO

EVANS KOUKIOS DBA SCIENTIFIC INFORMATION SYSTEMS PLAINTIFF V.
MICHAEL GANSON, LPA, ET AL. DEFENDANTS

CASE NO. A9902104
HAMILTON COUNTY
S.C. NO. 01-AP-061

This affidavit of disqualification filed by defendant Evans Koukios, seeks the disqualification of Judge Robert Ruehlman from further proceedings regarding the above-captioned case.

Affiant seeks Judge Ruehlman's disqualification because the judge allegedly received an *ex parte* communication from defense counsel. An ex party communication generally is defined as one between counsel in a pending case and the judge when the opposing counsel or party is not present. See Black's Law Dictionary, Seventh Edition. Here, the letter in question was sent by opposing counsel to affiant, who is acting as his own counsel, and was not a communication solely between counsel and the judge. As affiant was the recipient of the letter the communication was not *ex parte* in nature and is not expressly prohibited by Canon 9(B) of the Code of Judicial Conduct.

Affiant also asserts that Judge Ruehlman should be disqualified because of his alleged membership in the Cincinnati Bar Association, which is named as a defendant in the underlying action. This allegation was raised by affiant in a prior affidavit of disqualification, in which I concluded that a judge's membership in a local bar association was not a disqualifying factor. See *In re Disqualification of Judges of the First Dist. Court of Appeals* (2000), 91 Ohio St.3d 1207.

For these reasons, the affidavit of disqualification is found not well-taken and is denied. The case shall proceed before Judge Ruehlman.

**Dated this 19th day of July, 2001.**

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

Copies to: Marcia Mengel, Supreme Court Clerk
Honorable Robert Ruehlman
James Cissell, Hamilton County Clerk of Court
Evans Koukios
James Triona, Esq.
David C. Greer, Esq.
Felix J. Gora, Esq.

## APPENDIX O

COURT OF COMMON PLEAS
HAMILTON COUNTY OHIO

EVANS KOUKIOS D/B/A SCIENTIFIC INFORMATION SYSTEMS Plaintiff
vs.
MICHAEL GANSON, L.P.A.
MR. MICHAEL GANSON and
GRAYDON, HEAD and RITCHEY
MR. HENRY J. FINKE and
CINCINNATI BAR ASSOCIATION
MR. EDWIN W. PATTERSON, III Defendants

Case No. A99-02104
(Judge Stapleton)

**ENTRY**

This matter came on for hearing on Defendant Michael Ganson's Motion to Dismiss and Defendant Cincinnati Bar Association's Motion to Dismiss. Both motions are being brought pursuant to Civil rule 12(B)(6) Ohio Rules of Civil Procedure.

It is important to note that this action is identical to Case No. C-1-96-983 which has been litigated in the United States District Court. This Court adopts by reference the Judgment Order endorsed by his Honor Judge S. Arthur Spiegel affirming the reports and recommendations of the Magistrate Judge dated June 10, 1998 and August 7, 1998.

The law is clear that a party cannot relitigate in State Court the same subject matter litigated in the Federal Court. In this action the motions by both Defendants are granted in

that Plaintiff's claims are barred by *res judicata*. *Rogers v. Whitehall* (1986), 25 Ohio St.3d 67, 494 N.E.2d 1387.

This Court further finds that Plaintiff's Motion to Compel Discovery of Defendants Michael Ganson and Cincinnati Bar Association are dismissed. Likewise Plaintiff's Motion for sanctions against Defendants Michael Ganson and Cincinnati Bar Association are dismissed.

IT IS THEREFORE THE ORDER OF THIS COURT that Defendant Michael Ganson's Motion to Dismiss with Prejudice and Defendant Cincinnati Bar Association's Motion to Dismiss With Prejudice are granted.

This Court further finds pursuant to Civil Rule 54 Ohio Rules of Civil Procedure that there is no just cause for delay and that this is a final appealable order. Costs to Plaintiff.

/s/William B. Stapleton
William B. Stapelton, Judge

**ENTERED JUN 22 2000**

Copies to:
Mr. Evans Koukios
Pro Se Plaintiff
Scientific Information Systems
3516 Cornell Place
Cincinnati, OH 45220

James P. Triona, Esq.
David S. Lockemeyer, Esq.
119 E. Court Street, Suite 402
Cincinnati, OH 45202
Cincinnati, OH 45202

Felix J. Gora, Esq.
900 Fourth & Vine Tower
5 West Fourth Street
Cincinnati OH 45202

David Greer
Bieser, Greer & Landis, LLP
Attorney for Defendants Graydon Head and Ritchey and Henry J. Finke
400 National City Center
6 North Main Street
Dayton, OH 45402-1908

## APPENDIX P

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**[Filed October 12, 2000]**

No. 99-4060

| | |
|---|---|
| EVANS KOUKIOS | ) |
| | ) |
| Plaintiff-Appellant, | ) |
| v. | ) |
| | ) |
| MICHAEL GANSON, ET Al., | ) |
| | ) |
| Defendants-Appellees. | ) |

**BEFORE**: KEITH, SILER, AND BATCHELDER, Circuit Judges.

**ORDER**

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

submission and the decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green
Leonard Green, Clerk

## APPENDIX Q

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**[Filed August 11, 2000]**

No. 99-4060
No. C-1-96-983

| | |
|---|---|
| EVANS KOUKIOS | ) |
| | ) |
| Plaintiff-Appellant, | ) |
| | ) |
| v. | ) |
| | ) |
| MICHAEL GANSON; GRAYDON HEAD & RITCHIE; CINCINNATI BAR ASSOCIATION; SUPREME COURT OF OHIO OFFICE OF DISCIPLINARY COUNSEL, | ) |
| | ) |
| Defendants-Appellees. | ) |

Appeal from the United States District Court for the Southern District of Ohio, Western Division
S. Arthur Spiegel, United States Senior District Judge, Presiding

Before: KEITH, SILER, AND BATHELDER, Circuit Judges

## OPINION

Evans Koukios, an Ohio resident proceeding pro se, appeals a district court order dismissing his civil rights action filed under 42 U.S.C. § 1983. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking monetary and declaratory relief, Koukios sued Michael Ganson; Harry J. Finke and Graydon, Head & Ritchey; Edwin Patterson, III, and the Cincinnati Bar Association ("CBA"); and Sally Ann Steuk and the Supreme Court of Ohio Office of Disciplinary Counsel ("ODC"). Koukios alleged that: (1) Ganson engaged in professional misconduct as opposing counsel in a lawsuit Koukios filed in state court; (2) Finke and Graydon, Head & Ritchie, who represented Koukios, failed to respond properly to Ganson's misconduct, and disclosed confidential information to opposing counsel in another state court lawsuit; and (3) the CBA and the ODC failed to act on Koukios's complaints about Ganson. Ganson, Patterson, the CBA, Steuk, and the ODC filed motions to dismiss; Finke and Graydon, Head & Ritchey filed a motion for summary judgment. Koukios tendered proposed second and third supplemental complaints and an amended complaint, adding a claim against Ganson under the RICO Act, 18 U.S.C. § 1961 *et seq.* The magistrate judge recommended granting the motions to dismiss under Fed. R. Civ. P. 12(b)(1) and (6), dismissing Koukios's claim against Finke and Graydon, Head & Ritchey without prejudice, and

denying Koukios's motion for leave to supplement his complaint. In an order dated March 17, 1999, the district court adopted the magistrate judge's report and recommendation over Koukios's objections. The district court also denied Koukios's post-judgment motion.

In his timely appeal, Koukios argues that the district court erred when it dismissed his claims because: (1) the CBA and the ODC were not immune from suit; (2) Koukios has a viable RICO claim against Ganson; and (3) Koukios has a valid supplemental state law claim against Graydon Head & Ritchey.

Initially we note that Koukios does not argue that the district court erred by dismissing his claims against Steuk and Patterson. Issues raised in district court but not on appeal are considered abandoned and not reviewable on appeal. *See Robinson v. Jones*, 142 F.3d 905, 906 (6th Cir. 1998) (order); *Enertech Elec., Inc. v. Mahoning County Comm'rs*, 85 F.3d 257, 259 (6th Cir. 1996). Moreover, Koukios did not request any relief against these individual defendants either in his original complaint or his tendered amended complaint.

Upon de novo review, we conclude that the district court properly dismissed Koukios's claims under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, *see Ang v. Proctor & Gamble Co.*, 932 F.2d 540, 544 (6th Cir. 1991); *Duncan v. Rolm Mil-Spec Computers*, 917 F.2d 261, 263 (6th Cir. 1990), and under Rule 12(b)(6) for failure to state a claim. *See Bloch v. Ribar*, 156 F.3d 673, 677 (6th Cir. 1998); *Sistrunk v. City of Strongsville*, 99 F.3d 194, 197 (6th Cir. 1996). Koukios failed to state a 42 U.S.C. § 1983 claim against Ganson

because a lawyer representing a client is not, by virtue of being an officer of the court, a state actor under color of state law. *See Polk County v. Dodson*, 454 U.S. 312, 318 (1981).

Koukios's argument that the district court should not have dismissed his action against Ganson because he had a viable RICO claim is without merit. Koukios first presented his RICO theory in a motion to supplement his complaint pursuant to Fed. R. Civ.P. 15(d), after the magistrate judge recommended dismissing his complaint. We conclude that the district court did not abuse its discretion when it denied Koukios's motion to supplement because Koukios's supplemental pleading contained a new legal theory, not just events that occurred after the complaint. *See* Fed. R. Civ. P. 15(d); *McHenry v. Ford Motor Co.*, 269 F.2d 18, 25 (6th Cir 1959); *Schuckman v. Rubenstein*, 164 F.2d 952, 958-59 (6th Cir. 1947).

We also conclude that the district court properly dismissed Koukios's claim against the ODC under Fed. R. Civ. P. 12(b)(1) because the ODC enjoys Eleventh Amendment immunity. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996); *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 472-73 (1987); *Pennhurst State Sch. & Hosp. V. Halderman*, 465 U.S. 89, 100-01 (1984); *Thiekol Corp. v. Department of Treasury, State of Mich., revenue Div.*, 987 F.2d 376, 381 (6th Cir. 1993). Koukios's argument that the Ohio Supreme Court waived its immunity is without merit. The disciplinary rule upon which Koukios relies, Ohio Gov. Bar R. V, § 3(D)(2)(b)(ix), does not expressly waive immunity, and Koukios cites no authority for his

interpretation of the rule. *See Edelman v. Jordan,* 415 U.S. 651,673 (1974).

We also agree with the district court that the CBA is immune from suit, although our reasoning differs slightly from that of the district court. See *City Mgmt. Corp. v. U.S. Chem. Co.,* 43 F.3d 244,251 (6th Cir. 1994). The district court held that the CBA was entitled to judicial immunity. *See Sparks v. Character and Fitness Comm. Of Ky.,* 859 F.2d 428, 434 (6th Cir. 1988). The CBA's immunity is more accurately described as prosecutorial because the act of which Koukios complained concerned the CBA's enforcement of a code of conduct. *See Forrester v. White,* 484 U.S. 219,228-28 (1988); *Supreme Court of Va. V. Consumers Union of the United States, Inc.,* 446 U.S. 719, 736-37 (1980); *Imbler v. Pachtman,* 425 U.S. 409,421-29 (1976); *Berger v. Cuyahoga County Bar Ass'n,* 983 F.2d 718, 722 (6th Cir. 1993). In any event, the CBA is immune from suit.

Moreover, we agree with the district court that Koukios lacked standing to enforce Ohio's lawyer disciplinary system by suing the ODC or the CBA. *See Doyle v. Oklahoma Bar Ass'n,* 998 F.2d 1559, 1566-67 (10th Cir. 1993). In addition, the ODC's and the CBA's failure to discipline Ganson did not violate any federal right held by Koukios. *See Saier v. State Bar of Mich.,* 293 F.2d 756,761 (6th Cir. 1961); see also *Leeke v. Timmerman,* 454 U.S. 83, 86 (1981).

We conclude that the district court properly dismissed Koukios's claims against Finke and the law firm Graydon, Head & Ritchie without prejudice. The district court properly declined to exercise jurisdiction over this supplemental state law claim. See 28 U.S.C. §

1367(c)(3); United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).

Finally, Koukios's argument that the magistrate judge should have recused himself is without merit. First, Koukios failed to file an affidavit as required by 28 U.S.C. § 144. *See United States v. Sammons*, 918 F.2d 592,598-99 (6th Cir. 1990). Second, Koukios presented no evidence that the magistrate judge had any personal bias or prejudice either against Koukios or in favor of any of the defendants. See 28 U.S.C. § 144. Finally, Koukios did not show that the magistrate judge's impartiality could reasonably be questioned. See 28 U.S.C. § 455. Although the magistrate judge was a state court judge when Koukios's state court case was pending, he did not preside over Koukios's case. Accordingly, the magistrate judge did not abuse his discretion when he declined to recuse himself. See Sammons, 918 F.2d at 599.

For the foregoing reasons, we affirm the district court's order. See Rule 34(j)(2)(c), rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green
Leonard Green
Clerk

## APPENDIX R

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**[Filed November 4, 2002]**

No. 02-3304
No. C-1-96-983

| | |
|---|---|
| EVANS KOUKIOS | ) |
| | ) |
| Plaintiff-Appellant, | ) |
| | ) |
| v. | ) |
| | ) |
| MICHAEL GANSON, LPA, et al., | ) |
| | ) |
| Defendants-Appellees. | ) |

**ORDER**

Before: KEITH, KENNEDY, and MOORE, Circuit Judges

Evans Koukios, a Michigan resident proceeding pro se, appeals the district court order denying his motion for relief from judgment in this civil rights action. This case has been referred to a penel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this

panel unanimously agrees that oral argument is not needed. Fed.R.App.P. 34(a).

This is Koukios's second appeal. Koukios, then living in Ohio, sued attorneys, law firms, the Cincinnati Bar Association (CBA), and the Supreme Court of Ohio Office of Disciplinary Counsel (ODC) in 1996. Koukios alleged that the attorneys and law firms violated rights in a state court lawsuit and that the CBA and the ODC failed to act on Koukios's complaints. The defendants filed motions to dismiss and for summary judgment. The magistrate judge recommended granting the motions to dismiss under Fed.R.Civ.P. 12(b)(1) and (6). In an order dated March 17, 1999, the district court adopted the magistrate judge's report and recommendation over Koukios's objections and dismissed the case without prejudice. The district court also denied Koukios's post-judgment motion. Koukios appealed, and this court affirmed the district court's decisions. *Koukios v. Ganson*, No. 99-4060 (6th Cir. Aug. 11, 2000)(unpublished order).

Koukios filed a state court action against some of the same defendants in April 1997 [sic]. The court granted summary judgment to the defendants and ordered sanctions against Koukios. In November 2001, Koukios moved to set aside the district court's March 17, 1999, order under Fed.R.Civ.P.60(b) and to remove the state court case to the district court. Koukios argued that the district court should set aside its order and take jurisdiction over the state court case because the defendants used the district court's decision to argue res judicata. The defendants responded and Koukios filed a reply. He moved to disqualify counsel for the defendants and filed a supplemental pleading complaining that the defendants had been awarded fees and costs in the state court. The district court denied Koukios's motions and remanded the state court case.

In his timely appeal, Koukios essentially restates the arguments in his district court motions and moves for

miscellaneous relief. Appellee CBA moves for fees and costs under Fed.R.App.P.38.

This court reviews the denial of Rule 60(b) motions for an abuse of discretion. *Good v. Ohio Edison Co.*, 149 F.3d 413, 423 *6th Cir. 1998); *Lewis v. Alexander*, 987 F.2d 392, 396 (6th Cir 1993). An abuse of discretion esists where the reviewing court is firmly convinced that a mistake has been made. *Romstadt v. Allstate Ins. Co.*, 59 F.3d 608, 615 (6th Cir. 1995).

Upon review, we conclude that the district court did not abuse its discretion when the court denied Koukios's motion for relief from judgment. In his November 2001 motion, Koukios invoked Fed.R.Civ.P.60(b)(4)and (6)to set aside the district court's March 17, 1999, order. Koukios did not bring his motion within a reasonable time, and he did not show that he was entitled to relief under either subsection (4) or (6). Koukios waited over two years before he filed his Rule 60 motion and offered no legitimate reason for the delay. He brought the motion only after a state court ruled against him in a parallel action. Moreover, Koukios made no showing that the district court's March 17, 1999, order was void for purposes of Fed.R.Civ.P.60(b)(4). He argued that discovery taken in his state court case revealed collusion between a law firm defendant and the CBA, and that the firm improperly invoked attorney-client privilege when it refused to discuss the firm's relationship with its malpractice insurance carrier. This court affirmed the district court's decision to dismiss Koukios's case and to deny his first Rule 60 motion, and nothing he has presented casts doubt on those decisions. Finally, Koukios did not demonstrate that this case represents an unusual situation where principles of equity mandate relief under Fed.R.Civ.P.60(b). *See Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990). Because there is no basis for concluding that a mistake has been made, the district court did not abuse its discretion by denying Koukios's Rule 60(b) motion. See *Romstadt*, 59 F.3d at 615.

We further conclude that the district court's decision to remand Koukios's state court action is not reviewable. See 28 U.S.C. # 1446(d); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S.336, 346 (1976). The district court held that removal was improper because: (1) Koukios was the plaintiff, not the defendant, in the state court case; (2) the time for removal expired years before Koukios filed his motion; and (3) the state court had entered a final and appealable order disposing of all claims. Because the district court identified defects in the removal procedure, the court's decision to remand is not subject to review. See *Page v. City of Southfield,* 45 F.3d 128, 131 (6th Cir. 1996). Koukios's attempt to remove the case was without merit in any event.

Finally, the district court properly denied Koukios's motion to disqualify counsel for the defendants. Because Koukios's allegations involved only the state court case, the district court's decision to remand the case back to state court rendered Koukios's motion moot.

We now turn to the CBA's motion for fees and costs. This court may award damages and costs to the appellee if the court determines that an appeal is frivolous, *see* Fed.R.App.P.38, and award attorney's fees if the appeal was frivolous, unreasonable, or without foundation. *Wrenn v. Gould*, 808 F.2d 493, 505 (6th Cir. 1987)(citing *Christiansburg Garment Co. v. EEOC*, 434, 434 U.S. 412,421 (1978)). In this case, the district court ruled that the CBA was immune from suit, this court affirmed that decision, and the district court properly denied Koukios's most recent Rule 60 motion. Koukios's appeal is unreasonable and unfounded because he has raised no legitimate grounds to challenge the district court's decisions.

For the foregoing reasons, we deny Koukios's motions, grant the CBA's motion for fees and costs, and affirm the district court's order. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green

## APPENDIX S

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**[Filed March 24, 2003]**

No. 02-3304

**ORDER**

Before: KEITH, KENNEDY, and MOORE, Circuit Judges

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the orignal submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green, Clerk
Leonard Green, Clerk

## APPENDIX T

### THE SUPREME COURT OF OHIO

**[Filed JUN 11 2003]**

Evans Koukios, Appellant,
v.
Michael Ganson, L.P.A., Michael Ganson, Graydon, Head and Ritchey, Harry J. Finke, Cincinnati Bar Association and Edwin W. Patterson, III, Appellees

Case No. 03-859

ENTRY

This cause is pending before the Court as a discretionary appeal and a claimed appeal of right. Upon consideration of appellant's motion for stay of the First District Court of Appeals decision entered on April 2, 2003,

IT IS ORDERED by the Court that the motion for stay be, and hereby is, denied.

(Hamilton Count Court of Appeals; Nos. C010659, C010735 & C020091).

/s/Thomas Moyer
THOMAS MOYER
Chief Justice

## APPENDIX U

### THE SUPREME COURT OF OHIO

**[Filed JUL 30 2003]**

Evans Koukios, Appellant,
v.
Michael Ganson, L.P.A., Michael Ganson, Graydon, Head and Ritchey, Harry J. Finke, Cincinnati Bar Association and Edwin W. Patterson, III, Appellees

Case No. 03-859

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS: Docket Fee, $40.00, paid by Eric Timmons.[sic]

(Hamilton Count Court of Appeals; Nos. C010659, C010735 & C020091).

/s/Thomas Moyer
THOMAS MOYER
Chief Justice

## APPENDIX V

### THE SUPREME COURT OF OHIO

**[Filed SEP 24 2003]**

**Cite as *09/24/2003 Case Announcements*, 2003-Ohio-4948**

Evans Koukios, Appellant,
v.
Michael Ganson, L.P.A., Michael Ganson, Graydon, Head and Ritchey, Harry J. Finke, Cincinnati Bar Association and Edwin W. Patterson, III, Appellees

Case No. 03-859

ENTRY

**2003-0859. Koukios v. Ganson.**
Hamilton App. Nos. C-010659, C-010735 and C-020091. Reported at 99 Ohio St.3d 1513, 2003-Ohio-3957, 792 N.E.2d 200. On motion for reconsideration. Motion denied.

/s/Thomas Moyer
THOMAS MOYER
Chief Justice

## APPENDIX W

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed June 10, 1998]
[Document 54]

No. C-1-96-983

| | |
|---|---|
| EVANS KOUKIOS | ) |
| | ) |
| Plaintiff | ) |
| | ) |
| vs | ) |
| | ) |
| MICHAEL GANSON, et al., | ) |
| | ) |
| Defendants | ) |

(Spiegel, J.; Hogan, M.J.)

### REPORT AND RECOMMENDATION

This matter is before the Court on the Supreme Court of Ohio Office of Disciplinary Counsel's (ODC) motion to dismiss (Doc. 3), *pro se* plaintiff Evans Koukios's response (Doc. 10), defendant ODC's reply (Doc. 12), defendant the Cincinnati Bar Association's (CBA) motion to dismiss (Doc. 4), plaintiff's response (Doc. 7), defendant CBA's reply (Doc. 9), the motion for summary judgment by defendants Harry J. Finke (Finke) and the firm of Graydon, Head & Ritchey (GHR) (Doc. 11), plaintiff's memorandum in

opposition to the summary judgment motion by defendants Finke and GHR (Doc. 14), the reply by defendants Finke and GHR (Doc. 15), defendant Michael Ganson's motion to dismiss and amended notice of motion to dismiss (Docs. 22, 24), plaintiff's memorandum in opposition to defendant Ganson's motion to dismiss (Doc. 28), plaintiff's motion for leave to file a second supplemental complaint with fifth claim for injunctive relief (Doc. 23), defendant Ganson's memorandum in opposition to plaintiff's motion to amend (Doc. 27), and plaintiff's reply (Doc. 30). This Court initially issued three separate reports and recommendations regarding these motions. (See Docs. 25, 26, 33). Upon review by the District Court, this matter was remanded for consideration of these motions in a single report and recommendation. (Doc. 44). Finally, also before the Court are plaintiff's motions to supplement and amend the complaint. (Docs. 37, 45).

Background

The following recitation of events derives primarily from plaintiff's complaint and first supplemental complaint.[1] (Docs. 1, 20). However, this Court has also reviewed plaintiff's proposed second and third supplemental complaints and plaintiff's proposed first amended complaint. The Court has incorporated what relevant factual allegations it can glean as stated therein.[2] (See Docs. 23, 37, 45). Plaintiff

---

[1] Plaintiff's first motion to supplement the complaint was granted in part by this Court's September 5, 1997 order such that plaintiff was permitted to supplement his complaint with additional factual allegations against defendant Ganson. (See Doc. 25, order and report and recommendation, p. 13-14).

[2] Where both a motion to amend and a motion to dismiss the complaint are pending, the Court abuses its discretion by dismissing a suit on the basis of the original complaint without first considering and ruling on the pending motion to amend.

is the sole proprietor of a business known as Scientific Information Systems (SIS) which designs and installs computer software systems. On October 8, 1991, plaintiff, on behalf of SIS, filed an action in Hamilton County, Ohio, Court of Common Pleas, Case Number A91-0867. This action was brought against Marketing Dynamics, Inc. (MDI), apparently as a breach of contract claim. Defendant Michael Ganson, Esq. represented MDI in Case Number A91-08767.

In the course of the litigation, Ganson, acting as counsel for MDI, filed a counterclaim against plaintiff and SIS. The parties subsequently agreed to a dismissal of plaintiff's claims with the understanding that the counterclaim would not be dismissed and would be adjudicated independently. On October 1, 1992, plaintiff voluntarily dismissed his complaint in Case Number A91-08767. The state court then conducted a trial on MDI's counterclaim and apparently entered judgment in favor of MDI in an amount in excess of eight thousand dollars.

On October 15, 1992, plaintiff, on behalf of SIS, filed a second action in the Hamilton County, Ohio,

---

*Ellison v. Ford Motor.*, 847 F.2d 297, 300 (6th Cir. 1987). When a district court denies a motion to amend after granting a motion to dismiss, the appellate court reviews both the complaint and the proposed amended complaint for purposes of construing the facts. *Klusty v. Taco Bell Corp.*, 909 F. Supp. 516, 520 (S.D. Ohio 1995)(Merz, M.J.). Accordingly, in ruling on the pending motions to dismiss and motion for summary judgment which have been remanded for issuance of a consolidated report and recommendation, this Court must consider the original complaint, the first supplemental complaint, and the proposed second and third supplemental complaints as well as pro se plaintiff's proposed first amended complaint.

Court of Common Pleas, against MDI and Total Access Technologies, Case Number A92-09214. Defendant Ganson again represented MDI in this second state court action. On December 16, 1992, Ganson filed a motion to dismiss the complaint in Case Number A92-09214, based on the doctrine of *res judicata*. On March 16, 1993, the Hamilton County, Ohio, Court of Common Pleas filed an entry and decision granting the motion and dismissing Case Number A92-09214.

At some point during the course of this litigation, plaintiff deposited monies with the Hamilton County, Ohio, Clerk of Courts. In December 1992, Ganson initiated state court garnishment proceedings against plaintiff to satisfy the judgment in favor of MDI. The state court, Judge Crush, eventually ordered that these funds be released to Ganson, on behalf of MDI and in partial satisfaction of MDI's judgment against plaintiff in Case Number A91-08767. A check made out to MDI in the amount of $2,341.24 was released to Ganson on or about October 18, 1996. The funds were deposited by Ganson into an IOLTA account. Plaintiff appealed the state court decisions granting judgment in favor of MDI on its counterclaim, permitting the initiation of garnishment proceedings, and approving release of the funds deposited with the Court to Ganson on behalf of MDI. Plaintiff also filed complaints against Ganson with the CBA and ODC.

In an attempt to obtain the remaining balance on the state court judgment against plaintiff and SIS in Case Number A91-08767, on or about June 10, 1997, Ganson filed a motion for order of appearance and examination of judgment debtor. Plaintiff was directed to appear for a hearing and judgment debtor exam on

July 28, 1997. Plaintiff failed to appear for the examination. (See Doc. 23, proposed second amended complaint, letter from plaintiff to the Honorable Thomas Crush, attached)("With all respect for the court...I am not able to appear at any date or time to answer any questions put forth by Mr. Ganson...."). Plaintiff was subsequently issued a citation directing him to appear before the Magistrate Judge in the Hamilton County, Ohio, Court of Common Pleas on August 21, 1997, to show cause why he should not be held in contempt of court. (Doc. 23, proposed second supplemental complaint, copy of citation, attached). Plaintiff failed to appear at the August 21, 1997 show cause hearing. Plaintiff was then issued another citation by the state court for failure to appear and directed to appear on October 15, 1997 to show cause why he should not be held in contempt. After failing to appear for the second contempt proceeding, Judge Crush issued a bench warrant and plaintiff was arrested on November 24, 1997. Plaintiff was released on a $541.00 bond. Eventually, the contempt and garnishment proceeding related to Case Number A91-08767 were dropped when Huntington Bank (the Bank) foreclosed on MDI and the Bank signed a waiver of its right to execute on the judgment against plaintiff. Judge Crush then dismissed the garnishment proceedings, including the judgment debtor exam and related contempt proceedings. The bond posted following plaintiff's November 24, 1997 arrest was then returned to plaintiff. Though it is unclear from the pleadings and proposed supplemental and amended complaints, it appears that plaintiff has appealed portions of the state court proceedings and therefore litigation in the state court cases may still be ongoing.

Plaintiff's Claims

*Pro se* plaintiff Koukios brings this action for damages and declaratory relief under 42 U.S.C. § 1983 against defendants Michael Ganson, L.P.A.; the law firm of Graydon, Head and Ritchey/Mr. Harry Finke (GHR and Finke); the Cincinnati Bar Association/Mr. Edwin Patterson, III (CVA); and the Supreme Court of Ohio; Office of Disciplinary Counsel/Ms. Sally Ann Steuk (ODC). Plaintiff's original complaint comprises twenty-one pages and ninety paragraphs. The first, second, and third supplemental complaints and first amended complaint comprise an additional forty-three pages, not including attachments, and in excess of two hundred and sixty paragraphs. While the complaint, supplemental complaint, and proposed supplemental and amended complaints are extremely difficult to follow[3], plaintiff apparently alleges that defendants ODC and CBA violated his due process rights when they failed to impose disciplinary measures against defendant Ganson after plaintiff filed a grievance against him. Plaintiff alleges that ODC and CBA violated his constitutional rights by refusing to discipline Ganson for what plaintiff asserts were ethical violations by Ganson during the state court proceedings outline above. Plaintiff alleges that when defendant Ganson was acting as opposing counsel in a state court action to which plaintiff was a party,

---

[3] Plaintiff's proposed pleadings not only fail to comply with the requirements of Fed. R. Civ. P. 8 that the complaint be a short plaint statement of the claims, they have also crossed the line which separates the incomprehensible from the absurd. *See* Copy of Doc. 37, plaintiff's motion to supplement complaint of plaintiff with sixth claim for relief including RICO damages, attached hereto.

defendant Ganson filed an improper motion based on the doctrine of *res judicata*, improperly and maliciously served subpoenas on plaintiff's business clients directing them to appear for trial in Case Number A91-08767, and improperly garnished funds from plaintiff's corporation. Plaintiff brings these claims against defendants under 42 U.S.C. § 1983 alleging that he was denied due process of law in violation of the Fourteenth Amendment to the United States Constitution. Plaintiff seeks monetary relief from defendants Ganson; Graydon, Head and Ritchey/Mr. Finke; CBA; and ODC. Plaintiff also seeks the following declaratory and injunctive relief against the defendants ODC/Supreme Court of Ohio:

> ...judgment against the Supreme Court of Ohio to change its unconstitutional procedures of regulating the practice of law which are denying litigants their fundamental rights in the court's of Ohio (sic), including and not limited to judgment that the filing of the defense of res judicata by Mr. Ganson under the facts and circumstances alleged in this complaint was a civil wrong, and that disciplinary procedures against attorneys, cloaked in secrecy and a false promise of equity and redress by the courts, are unconstitutional.

(Doc. 1, compl., p. 21, ¶ 89).

**DEFENDANT ODC'S MOTION TO DISMISS** SHOULD BE GRANTED

Defendant ODC/Supreme Court of Ohio moves this Court to dismiss the plaintiff's claims pursuant to Fed. R.

Civ. P. 12(b)(1) and (6). Defendant ODC contends that this Court lacks jurisdiction over plaintiff's claims under the Eleventh Amendment doctrine because ODC is an arm of the Supreme Court and therefore a state agency. Defendant ODC contends that to the extent that plaintiff asserts claims against ODC employees in their official capacities, suit against such employees is likewise barred by the Eleventh Amendment. Defendant ODC also contends that plaintiff lacks standing to bring an action for failure to prosecute disciplinary charges. Finally, defendant ODC contends that it is entitled to absolute immunity from claims for damages because it was acting in a judicial and or prosecutorial capacity when it declined to discipline attorney Ganson.

In response to defendant ODC's motion, plaintiff argues that by filing a motion to dismiss, defendant ODC has waived its Eleventh Amendment immunity. (Doc. 10, p. 10). Plaintiff also argues that the complaint properly alleges § 1983 claims because defendant ODC's "secret" disciplinary hearings violate his First Amendment rights and because the Ohio Supreme Court's failure to regulate attorney conduct in conformity with the Ohio Supreme Court's Code of Professional Responsibility violates his due process rights. (Id., p. 9-10). Plaintiff asserts that to the extent that he did not name the proper defendants in his original complaint, after the close of discovery he will amend the complaint "to more precisely conform its pleading to the evidence...and alter any designations of defendants in their personal and/or official capacities as necessary, along with naming any other defendants who at the present time might be unknown to the plaintiff." (Id. p. 12). In addition, plaintiff argues that because defendant ODC attached a letter to its motion which was not attached to the original complaint, this

Court must consider defendant's motion as a motion for summary judgment. (Id., p. 3). Plaintiff moves the Court to continue its ruling on defendant's motion until after discovery has been conducted. (Id.). Finally, plaintiff moves the Court for an award of fees, based on his hourly rate as a computer consultant, and expenses for his opposition to defendant ODC's motion. (Id., p. 13).

The Legal Standard

Under a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, defendants can attack the complaint's jurisdictional allegations even though they are formally sufficient. *Baker v. Siemens Energy and Automation, Inc.*, 838 F. Supp. 1227, 1229 (S.D. Ohio 1993). When the Court reviews a factual attack on subject matter jurisdiction, no presumption of truthfulness applies to the factual allegations of the complaint. *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). The Court may rely on affidavits or any other evidence properly before it, and has wide latitude to collect evidence to determine the issue of subject matter jurisdiction. *Rogers v. Stratton Industries, Inc.*, 798 F.2d 913, 915 (6th Cir. 1986). The Court is entitled to resolve factual disputes and is free to weigh the affidavits, documents, and other evidentiary matters presented and satisfy itself as to its power to hear the case. *Ritchie*, 15 F.3d at 598. The Court must consider factual issues in a manner that is fair to the nonmoving party. *Rogers*, 798 F.2d at 915. Nevertheless plaintiff must demonstrate that the Court has jurisdiction over the subject matter in order to survive the motion. *Freidman v. United States*, 927 F.2d 259, 261 (6th Cir. 1991); *Moir v. Greater Cleveland Regional Transit*

*Authority*, 895 F.2d 266, 269 (6th Cir. 1990). Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed. R. Div. P. 12(h)(3).

By contrast, in determining a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the allegations in the complaint must be taken as true and construed in the light most favorable to the nonmoving party. *Westlake v. Lucas*, 537 F.2d 857 (6th Cir. 1976). A Rule 12(b)(6) motion to dismiss should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Although pro se complaints are held to less stringent standards as compared with formal pleadings drafted by attorneys, the Court is not required to fabricate allegations which are not plead. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *McDonald v. Hall*, 610 F.2d 16, 19 (1st Cir. 1979).

More than bare assertions of legal conclusions are required to satisfy federal notice pleading requirements. A complaint must contain "either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory." *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988)(quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985)(citations omitted) (emphasis in original)). A complaint will not be dismissed when plaintiff fails to plead facts in support of "every arcane element of his claim," but when a complaint "omits

facts that, if they existed, would clearly dominate the case," it is fair to assume that those facts do not exist. *McGregor v. Industrial Excess Landfill, Inc.*, 856 F.2d 39,43 (6th Cir. 1988) (quoting *O'Brien v. DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976), *cert. Denied sub nom. O'Brien v. Jordan*, 431 U.S. 914 (1977)).

**Plaintiff's Claims Against the Supreme Court** of Ohio Office of Disciplinary Counsel Are Barred by the Eleventh Amendment

The Eleventh Amendment to the United States Constitution bars a suit in federal court against a state or one of its agencies in the absence of the state's express consent to be sued or the unequivocal abrogation of the state's immunity by Congress. *P.R. Aqueduct & Sewer Auth. V. Metcalf & Eddy*, 113 S. Ct. 684 (1993); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99-100 (1984); *Edelman v. Jordan*, 415 U.S. 651 (1974). "This jurisdictional bar applies regardless of the nature of the relief sought." *Pennhurst*, 465 U.S. 89, 100-101. The Eleventh Amendment bar extends to actions where the state is not a named party, but where the action is essentially one of the recovery of money from the state. *Edelman*, 415 U.S. at 663; *Ford Motor Company v. Dept. of Treasury*, 323 U.S. 459, 464 (1945).

A state's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued as well. *Pennhurst*, 465 U.S. at 99. The fact that a state has waived immunity from suit in its own courts is not a waiver of its Eleventh Amendment immunity from suit in the federal courts. *Id.* Furthermore, because Eleventh Amendment immunity is jurisdictional, neither the litigant's

consent, nor oversight, nor convenience can justify a court's exercise of illegal power. *Wilson-Jones*, 99 F.3d. at 206. While a state may consent to suit by waiving its immunity, such waiver usually occurs only by explicit language in state legislation. *Id.* At 206 n.1. *See also Pennhurst*, 465 U.S. at 121. Ohio allows for the waiver of sovereign immunity only by its legislature, not by an individual attorney in a particular action. *Wilson-Jones*, 99 F.3d at 206 n.1.

The application of Eleventh Amendment immunity in an action against a public agency or institution and its officials turns on the question of whether the agency or institution can be characterized as an arm or alter ego of the state. *Bremiller v. Cleveland Psychiatric Institute*, 879 F. Supp. 782, 786 (N.D. Ohio 1995)(citing *Mt. Healthy City School District Bd. Of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)). Actions for damages against an agency or agency official acting as arm of the state are clearly barred by the immunity doctrine. *P.R. Aqueduct & Sewer Auth.*, 113 S. Ct. 684, 687; *Pennhurst*, 465 U.S. at 99-100. On the other hand, when a state official is sued in his or her official capacity for violations of constitutional rights, the Eleventh Amendment does not bar actions for prospective relief. *Edelman*, 415 U.S. at 667-68; *Bremiller*, 879 F.Supp. at 787; *Pennhurst.*, 465 U.S. at 102. The United States Supreme Court has long recognized that the expenditure of state funds may be required by the issuance of declaratory or injunctive relief without violating the Eleventh Amendment. *Ex Party Young*, 209 U.S. 123, 150 (1908).

In the present case, plaintiff fails to carry his burden of demonstrating that the Court has jurisdiction

over his claims against ODC/the Supreme Court of Ohio. It is undisputed that both ODC and the Ohio Supreme Court are arms of the state. It is also undisputed that plaintiff's claims for money damages against these defendants are claims that, if successful, would require payment from the state treasury. The State of Ohio has neither waived its immunity nor consented to be sued in federal court. Contrary to plaintiff's assertions, defendant ODC's filing of a motion to dismiss does not act as a waiver of its Eleventh Amendment defense. *See Wilson-Jones,* 99 F.3d at 206. Thus, any action against ODC and the Ohio Supreme Court is clearly barred by the Eleventh Amendment and should be dismissed for lack of jurisdiction. *Pennhurst,* 465 U.S. at 99-100. Furthermore, to the extent that plaintiff seeks declaratory or injunctive relief against ODC, these claims should likewise be dismissed. Plaintiff's contention that asserting the doctrine of *res judicata* as a defense somehow violates his constitutional rights and should be enjoined is wholly without merit. For the foregoing reasons, defendant ODC's motion to dismiss should be granted.

Plaintiff's Claims Against Sally Ann Steuk Should be Dismissed Because They Are Barred by the Eleventh Amendment, Plaintiff Lacks Standing to Assert These Claims, and Plaintiff Fails to State A Claim Upon Which Relief Can Be Granted

To the extent that plaintiff's complaint alleges any claims against Steuk, these claims should also be dismissed. First, plaintiff's complaint fails to set forth any allegations that demonstrate an intent to assert claims against Mr. Steuk in her individual capacity. *See*

*Davis v. Kent State University*, 928 F. Supp. 729, 732-33 (N.D. Ohio 1996). Indeed, the only reference to Ms. Steuk relates to her actions as an investigator on behalf of the ODC, and plaintiff seeks no prayer for relief from any individual conduct. (See Doc. 1, compl., p. 18-21, ¶¶ 78, 88, 89). Thus, while plaintiff names Steuk in the complaint, the only allegations asserted against her are for actions taken in her official capacity.[4] *See Thoikol v. Dep't. of Treasury*, 987 F.2d 376, 383 (6th Cir. 1993); *Pelfrey v. Chambers*, 43 F.3d. 1034, 1038 (6th Cir. 1995), *cert. denied*, 115 S. Ct. 2269 (1995). Second, any claims for damages against Steuk acting in her official capacity are barred under the Eleventh Amendment and should be dismissed for the same reasons the Court should dismiss the claims against ODC and the Supreme Court of Ohio. *See Pennhurst*, 465 U.S. at 99-101. Third, plaintiff's claims against defendant Steuk should be dismissed because plaintiff lacks standing and because the complaint fails to state a claims upon which relief can be granted.

Private persons have no standing to complain about a prosecuting official's failure to bring an official action. *Leeke v. Timmerman*, 454 U.S. 83 (1983). *See also Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (private citizen lacks judicially cognizable interest in whether another person is or is not prosecuted). Plaintiff lacks standing to assert a violation of due process rights based on ODC's decision not to impose disciplinary

---

[4] Plaintiff has not filed a motion to amend his complaint to allege claims against any of the ODC or CBA defendants in their individual capacities, despite his assertion that he would file such a motion. Plaintiff's proposed supplemental and amended complaints do not assert claims against these defendants individually.

measures against defendant Ganson. *See Doyle v. Oklahoma Bar Ass'n*, 998 F.2d 1559, 1566 (10th Cir. 1993)(in action brought against bar association concerning discipline of attorney, non-attorney plaintiff has no more standing to insert himself into attorney disciplinary system than he would have to compel the state to issue an attorney's license). Accordingly, plaintiff's claims for injunctive relief against Steuk and ODC should be dismissed.

Assuming *arguendo* that plaintiff has standing to assert a claim against Steuk and ODC for failing to impose disciplinary measures against defendant Ganson, such a claim fails to allege a violation of a federal constitutional right. "License to practice law, the continuation of such license, regulation of the practice and procedure for disbarment and discipline are matters that are within the province of an individual state." *Saier v. State Bar of Michigan*, 293 F.2d 756, 758 (6th Cir. 1961), *cert. denied*, 368 U.S. 947 (1961). It is undisputed that the Ohio Supreme Court has original jurisdiction in the regulation of attorney practice and discipline. Ohio Const. Art. IV, § II(B). Plaintiff has no right under the Federal Constitution to require that the Supreme Court of the State of Ohio or the ODC process his complaint against attorney Ganson. *Id.* at 759. *See also Blanton v. United States*, 96 F.3d 227, 233 (6th Cir. 1996) (consistent with principles of comity and federalism, lower federal courts lack jurisdiction to review state court proceedings, including matters involving attorney licensure or discipline). Thus, apart from certiorari by the United States Supreme Court, federal courts have no power to review the adjudicative determination by the Ohio Supreme Court and the ODC that defendant Ganson's

conduct did not warrant disciplinary action. *Blanton*, 94 F.3d at 234. Because the regulation of the practice of law, including disciplinary procedures, is clearly a function of state government, plaintiff's complaint against the ODC defendants, including Steuk, fails to allege any deprivation of a right which would give rise to a cause of action under 42 U.S.C. § 1983. *Saier*, 293 F.2d at 760. Accordingly, any claims against defendants Office of Disciplinary Counsel, the Supreme Court of Ohio and Ann Steuk which are not barred by the Eleventh Amendment should be dismissed under Fed. R. Civ. P. 12(b)(6).

Because this Court finds that plaintiff's claims against defendants the Supreme Court of Ohio/ODC/Sally Ann Steuk should be dismissed for lack of jurisdiction and for failure to state a claim upon which relief can be granted, plaintiff's motion for fees and costs (Doc. 10) is denied. Furthermore, because this Court issues this consolidated report and recommendation without reference to any evidentiary materials outside the pleadings, plaintiff's motion to convert defendant ODC's motion to dismiss to a motion for summary judgment is likewise denied.

*DEFENDANT CBA'S MOTION TO DISMISS* SHOULD BE GRANTED

The allegations against defendant CBA/Edwin Patterson, III as set forth in the complaint generally allege that these defendants failed "to properly discharge their duties in assisting the Supreme Court to regulate the practice of law," by refusing to investigate complaints or take disciplinary action against defendant Ganson. (*See* Doc. 1, compl., pp. 17-20).

Defendant CBA contends that plaintiff's claims against it should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and (6) because plaintiff lacks standing to assert a claim against it and because plaintiff fails to state a claim upon which relief can be granted.

It is undisputed that the Supreme Court of Ohio has delegated to local bar associations an essential role in disciplining members of the bar. Ohio S. Ct. Gov. Bar R. V(1)-(3). The Ohio Supreme Court has also set forth procedures to address a grievant who is dissatisfied with a Grievance Committee determination. Ohio S. Ct. Gov. Bar R. V(4). Thus, it is undisputed that the claims against defendant CBA are allegations based on its role in the regulation of the practice of law as mandated by the Ohio Supreme Court. Plaintiff lacks standing to assert a violation of due process rights based solely on defendant CBA's decision not to impose disciplinary measures against defendant Ganson. *See Doyle*, 998 F2d at 1566. Furthermore, as discussed above, even if plaintiff had standing to assert such a claim, the complaint fails to allege any deprivation of a right which would give rise to a cause of action under 42 U.S.C. § 1983. *See Saier*, 293 F.2d at 760.

DEFENDANT GANSON'S MOTION TO DISMISS SHOULD BE GRANTED AND PLAINTIFF'S MOTIONS TO SUPPLEMENT AND AMEND THE COMPLAINT SHOULD BE DENIED AS MOOT

Defendant Ganson moves this Court to dismiss plaintiff's claims against him pursuant to Fed. R. Civ. P. 12(b)(6). Defendant Ganson contends that plaintiff cannot maintain a cause of action against him under 42

U.S.C. § 1983 because Ganson is not a state actor. Defendant further contends that the Court should deny plaintiff's motion to file a second supplemental complaint because supplementing the complaint is futile in light of the pending motion to dismiss and would be a waste of judicial resources.

Plaintiff opposes defendant's motion. Plaintiff also moves to supplement his complaint adding a fifth cause of action against defendant Ganson, including a request for injunctive relief. Plaintiff contends that since this Court issued its September 5, 1997 order permitting him to supplement his complaint with respect to defendant Ganson, Ganson has engaged further in conduct that constitutes a denial of plaintiff's due process rights. The alleged conduct includes having plaintiff served with a subpoena and a contempt charge for plaintiff's having failed to appear in state court for a hearing on pending state garnishment proceedings.

Section 1983 of Title 42 of the United States Code provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State,...subjects, or causes to be subjected, any citizen...to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law." 42 U.S.C. § 1983. Thus, in order to maintain an action under § 1983, plaintiff must allege that: (1) he was deprived of a right or privilege secured by the Constitution or laws of the United States, and (2) the deprivation was caused by a person acting under color of state law. *Grahm v. National Collegiate Athletic Ass'n*, 804 F.2d 953, 957 (6th Cir. 1986)(citing *Parratt v. Taylor*,

451 U.S. 527, 535 (1981), *overruled in part on other grounds, Daniels v. Williams,* 474 U.S. 327 (1986)); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 150 (1970).

In the present case, plaintiff contends that defendant Ganson's conduct denied him due process in violation of the Fourteenth Amendment to the United States Constitution. (*See* Doc. 1, complaint, Count One, pp. 3-12; Doc. 20), supplemental complaint, pp. 3-6). Specifically, plaintiff contends that he was denied due process in the underlying state court proceedings when defendant Ganson filed a motion that plaintiff alleges did not comply with the Ohio Rules of Civil Procedure. As discussed above, plaintiff concedes that after filing the initial state court action, he subsequently agreed to a voluntary dismissal of the action. Plaintiff also concedes that when the parties to this state court action agreed to dismiss, they also agreed that the pending counterclaim would be adjudicated independently. MDI, the state court defendant in this initial action was represented by attorney Ganson. Following dismissal and adjudication of the courterclaim, plaintiff subsequently instituted a second action against defendant Ganson's client. Defendant Ganson sought, and was granted, an order dismissing the second action under the doctrine of *res judicata.* Plaintiff alleges that defendant Ganson has denied him due process by securing such a dismissal. Plaintiff also contends that defendant Ganson violated his due process rights by improperly and maliciously serving subpoenas on plaintiff's business clients, and improperly garnishing funds from plaintiff's corporation during the course of these state court proceedings.

Assuming *arguendo* that the allegations in plaintiff's complaint are sufficient to establish the deprivations of a right or privilege secured by the Constitution or laws of the United States, plaintiff's complaint against defendant Ganson should be dismissed nevertheless. It is undisputed that the allegations against defendant Ganson are based on his conduct as an attorney and an officer of the court in underlying state court proceedings, some of which are still on-going. Defendant Ganson's status as an attorney does not render his conduct "state action" for purposes of § 1983. *Shuttlesworth v. Housing Opportunities Made Equal*, 873 F. Supp 1069, 1080 (S.D. Ohio 1994)(Rubin, J.). *See also Polk County v. Dodson*, 454 U.S. 312, 325 (1981). "Privately-retained attorneys do not act 'under color of state law' pursuant to § 1983, and their acts do not constitute 'state action' for purposes of the Fourteenth Amendment." *Border City Savings & Loan Ass'n v. Kennecorp Mortgage & Equities*, 523 F. Supp. 190, 193 (S.D. Ohio 1981) (Rice, J.) Nor does a party's use of the state judicial system constitute state action under § 1983. *See Shuttlesworth*, 873 F. Supp. at 1080 (citing *Dunwoody Homeowner's Ass'n v. DeKalb County*, 887 F.2d 1455, 1461 (11th Cir. 1989)). *See also Ropoleski v. Rairgh*, 886 F. Supp. 1356, 1364 (W.D. Mich. 1995)(merely resorting to the courts and being on the winning side does not make one a joint actor with agents of the state.).

Whether the Court looks to the original and first supplemental complaints or the proposed second and third supplemental complaints and proposed amended complaint, plaintiff has failed to present any factual allegations demonstrating that defendant Ganson engaged in conduct "under color of state law"

sufficient to support a cause of action under 42 U.S.C. § 1983. Even if this Court were to permit plaintiff to again supplement his complaint, the supplemental allegations merely seek injunctive relief from on-going state court proceedings, including garnishment and contempt proceedings against plaintiff. None of the allegations establish that defendant Ganson's conduct can be construed as state action for purposes of § 1983. For the foregoing reasons, plaintiff's complaint should be dismissed as to defendant Ganson pursuant to Fed. R. Civ. P. 12(b)(6).

THE MOTION TO DISMISS BY DEFENDANTS GRAYDON HEAD & RITCHEY AND HARRY J. FINKE, ESQ. SHOULD BE GRANTED

To the extent that plaintiff's complaint, and proposed supplemental and amended complaints raise claims against defendant GHR and Finke, these claims are based on alleged malpractice by these defendants. Plaintiff asserts that defendants GHR and Finke negligently breached their contract to represent plaintiff and failed to regulate the conduct of Ganson while he was acting as opposing counsel in the underlying state court actions. These allegations fail to confer original jurisdiction on this Court. These claims are not based on federal law nor is there diversity of citizenship among the parties. Because this Court recommends that plaintiff's claims against the other defendants should be dismissed, the Court should decline to exercise supplemental jurisdiction over plaintiff's claims against defendant GHR and Finke. Accordingly, the claims against defendant GHR and Finke should be dismissed pursuant to 28 U.S.C. § 1367 (c).

Because this Court has reviewed the factual allegations set forth in plaintiff's proposed supplemental and

amended complaint for purposes of deciding the within motions, and because the Court recommends that defendants' motions to dismiss should be granted, it is clear that plaintiff's proposed supplemental and amended complaints could not survive a motion to dismiss. Therefore, plaintiff's motions to supplement and amend the complaint should be denied based on the futility of amendment doctrine.

IT IS THEREFORE RECOMMENDED THAT:

*1)* The motion to dismiss by defendant the Supreme Court of Ohio Office of the Disciplinary Counsel/Ms. Sally Ann Steuk (Doc. 3) should be GRANTED;

*2)* The motion to dismiss by defendant the Cincinnati Bar Association/Mr. Edwin Patterson, III (Doc. 4) should be GRANTED;

*3)* The claims against defendants Graydon, Head and Ritchey and Harry J. Finke (Doc. 11) should be dismissed pursuant to 28 U.S.C. § 1367 (c) and defendants' summary judgment motion (Doc. 11) should be DENIED AS MOOT;

*4)* Defendant Ganson's motions to dismiss (Docs. 22,24) should be GRANTED; and

*5)* Plaintiff's motions to supplement the complaint (Docs. 23, 37, 45) should be DENIED.

Date: June 9, 1998
/s/Timothy S. Hogan
Timothy S. Hogan
United States Magistrate Judge

Lww/TSH

## APPENDIX X

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed March 17, 1999]
[Document 89]

No. C-1-96-983

| | |
|---|---|
| EVANS KOUKIOS | ) |
| | ) |
| Plaintiff(s) | ) |
| v. | ) |
| | ) |
| MICHAEL GANSON, ET Al., | ) |
| | ) |
| Defendant(s) | ) |

District Judge S. Arthur Spiegel

JUDGMENT IN A CIVIL CASE

Decision by Court: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

...the Court reviewed the complete file de novo, pursuant to 28 USC Sec. 636, and the Court finds the Magistrate Judge's Reports and Recommendations,

dated June 10, 1998 and August 7, 1998, to be correct. For these reasons the Magistrate Judge's reports and Recommendations, the Court DENIES Plaintiff's objections. (2) The Court AFFIRMS and ADOPTS the Reports and Recommendations of the Magistrate Judge and GRANTS the Motion to Dismiss by Defendants Supreme Court of Ohio Office of Disciplinary Counsel and Sally Ann Steuk, the Motion to Dismiss by Defendants Supreme Court of Ohio Office of Disciplinary Counsel and Sally Ann Steuk, the Motion to Dismiss by Defendants Cincinnati Bar Association and Edwin Patterson, III and the Motion to Dismiss by Defendant Michael Ganson. In addition, this Court DISMISSES WITHOUT PREJUIDICE the claims against Defendants Graydon, Head & Ritchey and Harry J. Finke pursuant to 28 USC Sec. 1367(c) and DENIES as MOOT Defendants' Summary Judgment Motion. Finally, Plaintiff's motions to supplement and amend the Complaint are DENIED and Plaintiff's motions for Rule 11 sanctions and the recusal of the Magistrate Judge are DENIED.

March 17, 1999

Kenneth Murphy, Clerk

/s/Vicki Penley
Vicki Penley
Deputy Clerk

## APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed March 17, 1999]
[Document 89]

No. C-1-96-983

| | |
|---|---|
| EVANS KOUKIOS | ) |
| | ) |
| Plaintiff, | ) |
| v. | ) |
| | ) |
| MICHAEL GANSON, et al., | ) |
| | ) |
| Defendants | ) |

District Judge S. Arthur Spiegel

**ORDER**

This matter is before the Court on the Magistrate Judge's June 10, 1998 Report and Recommendation (doc. 54) advising that the Court deny Plaintiff Evans Koukios's motions to supplement and amend his Complaint (docs. 23, 37 & 45), dismiss Plaintiff's claims against Defendants Harry J. Finke and Graydon, Head & Ritchey and deny their motion for summary judgment as moot (doc. 11), and grant the motions to dismiss filed by Defendant Michael Ganson, Defendants Edwin Patterson, III, and the Cincinnati Bar

Association, and Defendants Sally Ann Steuk and the Supreme Court of Ohio Office of Disciplinary Counsel (docs. 3, 4, & 22); Plaintiff's Motion to review the Magistrate Judge's Report and Recommendation (doc. 58); Plaintiff's Motion for Reconsideration (doc. 59); Defendant Cincinnati Bar Association Memorandum in Opposition to Plaintiff's Motion (doc. 60); and Defendant Graydon, Head & Ritchey's Memorandum in Opposition to Plaintiff's Motion (doc. 61).

Also before the Court is the Magistrate Judge's August 7, 1998 Report and Recommendation (doc. 63) denying Plaintiff's motion for sanctions (doc. 53); Plaintiff's Motion to Review the Report and Recommendation and Motion for Recusal (doc. 64); Defendant Michael Ganson's Memorandum in Opposition (doc. 65); Defendant Cincinnati Bar Association's Memorandum in Opposition (doc. 66); and Plaintiff's Reply (doc. 67).

## BACKGROUND

Pro se Plaintiff Evans Koukios brings this action for monetary and declaratory relief under 42 U.S.C. § 1998 against Defendants Michael Ganson; Harry J. Finke and Graydon, Head & Ritchey; Edwin Patterson, III, and the Cincinnati Bar Association; and Sally Ann Steuk and the Supreme Court of Ohio Office of Disciplinary Counsel. This case arises from a dispute involving two lawsuits filed by Plaintiff in the Hamilton County Court of Common Pleas. The dispute primarily involves Plaintiff's allegations of professional misconduct against Defendant Ganson, an attorney who represented one of the defendants in those lawsuits (see docs. 1 & 20). The following facts

are drawn from Plaintiff's filings in the matter (see docs. 1, 20, 23, 37, & 45).

Plaintiff is the sole proprietor of a business known as Scientific Information Systems ("SIS"). On October 8, 1991, Plaintiff filed a complaint in the Hamilton County Court of Common Pleas against Marketing Dynamics, Inc. ("MDI"). Defendant Ganson represented MDI in that action. Plaintiff was represented by attorney Roger E. Friedman; eventually, Graydon, Head & Ritchey and attorney Harry J. Finke entered an appearance as co-counsel in that case on behalf of Plaintiff. Defendant Finke filed a motion for leave to amend the complaint to add claims against another company, Total Access Technologies ("TAT"), but the state court denied the motion.

During the state court case, Defendant Ganson filed a counterclaim on behalf of MDI against Plaintiff and SIS. Then, on October 1, 1992, Plaintiff voluntarily dismissed his complaint against MDI. Thereafter, Judge John Keefe held a bench trial on the counterclaim and entered judgment in favor of MDI. Meanwhile, Plaintiff filed another action against MDI and TAT in the Hamilton County Court of Common Pleas on October 15, 1992, and Plaintiff was again represent by Mr. Friedman and Defendant Finke. Defendant Ganson, on behalf of MDI, filed a motion to dismiss the second state court case based on the doctrine of res judicata. On March 16, 1993, Judge Ann Marie Tracey granted MDI's motion.

In December, 1992, Defendant Ganson initiated state court garnishment proceedings against Plaintiff to satisfy the judgment in favor of MDI in the first state

court case. In 1996, the state court ordered that funds originally deposited by Plaintiff with the Hamilton County Clerk of Courts be released to Defendant Ganson in partial satisfaction of MDI's judgment. In an attempt to recover the balance of the money due MDI, the state court also ordered in 1997 a hearing and a judgment debtor examination. However, Plaintiff failed to appear for both the examination and subsequent contempt of court proceedings. The state court dismissed the contempt and garnishment proceedings related to the counterclaim judgment after Huntington Bank foreclosed on MDI and the Bank signed a waiver of its right to execute the judgment against Plaintiff.

Plaintiff appealed the state court decisions granting judgment in favor of MDI on the counterclaim, permitting the initiation of garnishment proceedings, and approving release of the funds deposited with the Clerk of Courts. He also filed a complaint against Defendant Ganson with the Cincinnati Bar Association ("CBA") and the Supreme Court of Ohio Office of Disciplinary Counsel ("ODC") alleging ethical violations.

Specifically, Plaintiff complained that Defendant Ganson filed an improper motion based on res judicata, improperly and maliciously served subpoenas on Plaintiff's business clients directing them to appear in the state court actions, and improperly garnisheed funds from Plaintiff's business. Plaintiff also asserted that Defendants Finke and Graydon, Head & Ritchey acted with intentional misconduct, or were negligent, in failing to file a disciplinary complaint or to take other action against Defendant Ganson with respect to

his alleged misconduct. Plaintiff also contended that Defendants Finke and Graydon, Head & Ritchey negligenly divulged confidential information about him to an attorney representing TAT.

The ODC and the CBA investigated the charges against Defendant Ganson and concluded that no violation of the Ohio Code of Professional Responsibility had occurred. Thereafter, the ODC and the CBA dismissed Plaintiff's grievances.

In the case now before this Court, Plaintiff claims that Defendants denied him due process of law in violation of the fourteenth Amendment. Plaintiff asserts that the CBA and the ODC violated his due process rights when then failed to impose disciplinary measures against Defendant Ganson for what Plaintiff argues were ethical violation at the state court level. In this Complaint, Plaintiff specifically alleges than CBA failed to properly discharge its duties in assisting the Ohio Supreme Court to regulate the practice of law, that the CBA has a policy of refusing to investigate complaints, and that the CBA refused to take action against Defendant Ganson.

## DISCUSSION

### I. Magistrate Judge's Report and Recommendations (doc. 54).

On June 10, 1998, the Magistrate Judge issued a Report and Recommendation advising this Court to (1) grant the motions to dismiss filed by Defendants Ganson, ODC, and CBA; (2) dismiss without prejudice the claims against Defendants Finke and Graydon,

Head & Ritchey and deny as moot their motion for summary judgment; and (3) deny Plaintiff's motions for leave to supplement and amend the Complaint. For the following reasons, this Court AFFIRMS and ADOPTS the Magistrate Judge's Report and Recommendation.

A. Defendant ODC's Motion to Dismiss

The ODC moved to dismiss Plaintiff's Complaint pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6), arguing specifically that Plaintiff lacks standing and that Defendant is cloaked in Eleventh Amendment immunity. When facing a Rules 12(b)(1) motion, a plaintiff must demonstrate that jurisdiction exists over the subject matter to be considered by the federal court. Moir v. Greater Cleveland Reg'l Transit Auth., 895 F.2d 266, 269 (6th Cir. 1990). On the other hand, a Rule 12(b)(6) motion is only granted against a plaintiff if "it appears beyond doubt than the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

In the Report and Recommendation, the Magistrate Judge recommended than ODC's motion be granted under Rule 12(b)(6) because Plaintiff's claims are barred by the Eleventh Amendment. The Eleventh Amendment bars a suit in federal court against a state or one of its agencies, regardless of the type of relief sought, unless the state expressly consents to be sued or Congress unequivocally abrogates the state's immunity. See Seminole Tribe v. Florida, 517 U.S. 44, 58 (1996); Puerto Rico Aqueduct & Sewer Auth. V. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993);

Pennhurst State Sch. & Hosp. V. Halderman, 465 U.S. 89, 99-100 (1984); Edelman v. Jordan, 415 U.S. 651, 662-63 (1974). The Eleventh Amendment also precludes an action against a public agency and its officials if the agency can be characterized as an arm or alter ego of the state. Bremiller v. Cleveland Psychiatric Inst., 879 F. Supp. 782, 786 (N.D. Ohio 1995).

As the Magistrate Judge noted in this case, it is undisputed that both the Ohio Supreme Court and the ODC are arms of the state. Moreover, the State of Ohio has neither waived its immunity nor consented to be sued in federal court. This Court agrees with the Magistrate Judge that the Eleventh Amendment bars Plaintiff's action for damages against Defendant ODC in federal court. The Court also affirms the Magistrate Judge's finding than Plaintiff's claim for declaratory or injunctive relief against ODC is "wholly without merit" and should be dismissed under Rule 12(b)(6) since there is no indication how enjoining a res judicata defense would prevent a violation of Plaintiff's constitutional rights.

The Magistrate Judge further recommended that, to the extent Plaintiff's complaint alleges claims against Defendant Steuk, those claims should be dismissed because claims for damages against Defendant Steuk in her official capacity are barred by the Eleventh Amendment, and because Plaintiff lacks standing to complain about a prosecuting official's failure to bring an official action. Nonetheless, Plaintiff objected to the report and recommendation, contending that he also seeks declaratory and injunctive relief against Defendant Steuk and that his Complaint alleges facts sufficient to state a claim against her.

We find Plaintiff's objections without merit. Even if it were appropriate to bring an action against Defendant Steuk in her official capacity for prospective relief, Plaintiff nevertheless failed to demonstrate how he has standing to require Defendants Steuk, ODC or CBA to pursue disciplinary charges. See Leeke v. Timmerman, 454 U.S. 83, 86-87 (1981) (holding that a private citizen lacks standing to complain about a prosecuting official's failure to bring an official action); Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) (holding same). Moreover, Plaintiff failed to sufficiently plead a violation of federal constitutional rights, and thus his claims must be dismissed under Fed. R. Civ. P. 12(b)(6). See Saier v. State Bar of Michigan, 293 F.2d 756, 759 (6th Cir. 1961) (finding that the regulation and discipline of lawyers is within the province of an individual state and that the federal constitution does not guarantee a private citizen the right to require state bar associations to investigate lawyers).

B. Defendant CBA's Motion to Dismiss

Defendant CBA moved to dismiss the Complaint pursuant to Fed.R.of Civ.P. 12(b)(1), 12(b)(2), and 12(b)(6) because Plaintiff lacks standing to bring the action against the CBA and because absolute judicial immunity bars Plaintiff's claim against the CBA. Plaintiff objects to the Magistrate Judge's recommendation to dismiss the claims against the CBA, arguing than the CBA is not a governmental agency but rather is a private party.

In his Report and Recommendation, the Magistrate Judge first noted that the Supreme Court of Ohio delegated disciplinary powers to local bar associations pursuant to Ohio S. Ct. Gov. Bar R. V(1)-(3). The claims against Defendant CBA in this case are based on this disciplinary role. The Court agrees with the Magistrate Judge's finding than Plaintiff lacks standing to assert a violation of due process rights based solely on Defendant CBA's decision not to impose disciplinary measures against Defendant Ganson. Doyle v. Oklahoma Bar Ass'n, 998 F.2d 1559, 1566 (10th Cir. 1993) (holding that the plaintiff lacked standing to assert a §1983 claim relating to the disposition of a grievance he filed against his ex-wife's attorney). Plaintiff's objection than Defendant CBA is a private party is also without merit. Those who perform judicial acts on behalf of the judiciary are entitled to immunity, and the action of Defendant DBA about which Plaintiff complains is a judicial act to which absolute immunity attaches. See Sparks v. Character & Fitness Comm. Of Kentucky, 859 F.2d 428, 434 (6th Cir. 1988) (holding that the State Supreme Court's action in denying a bar application is a judicial act).

C. Defendant Ganson's Motion to Dismiss

Defendant Ganson moves this Court to dismiss Plaintiff's claims pursuant to Red. R. Civ. P. 12(b)(6). Defendant Ganson argues than Plaintiff cannot maintain a cause of action against him under 42 U.S.C. § 1983 because Defendant Ganson is not a state actor. Defendant Ganson also contends than the Court should deny any motions by Plaintiff to file supplements or amendments to his Complaint because such filings would be futile in light of the pending motions to

dismiss. The Magistrate Judge recommended than Defendant Ganson's motion be granted and then Plaintiff's motions to file supplemental and emend complaints be denied.

Under § 1983, Plaintiff must prove (1) than the challenged conduct was committed by a person acting under the color of state law, and (2) that the conduct "caused" a deprivation of his rights or privileges secured by the laws or Constitution of the United States. Baker v. McCollan, 443 U.S. 137, 140 (1979). Plaintiff contends that Defendant Ganson's conduct denied him due process in violation of the Fourteenth Amendment. Specifically, Plaintiff asserts that he was denied due process when Defendant Ganson filed a motion based on res judicata in the underlying state court proceedings. The Magistrate Judge found that, even if the allegations in Plaintiff's Complaint are sufficient to establish the deprivation of a constitutionally-protected right or privilege, Plaintiff's Complaint against Defendant Ganson should be dismissed because Defendant Ganson did not act under color of state law. This Court agrees with the Magistrate Judge's findings.

Plaintiff's allegations against Defendant Ganson are based on his conduct as an attorney and an officer of the court in the underlying state court proceedings. Defendant Ganson's status as an attorney and an officer of the court, however, does not render his conduct "state action" for purposes of § 1983. Shuttlesworth v. Hous. Opportunities Made Equal, 873 F. Supp. 1069, 1080- (S.D. Ohio 1994); Border City Sav. & Loan Ass'n v. Kennecorp Mortgage & Equities, 523 F. Supp. 190, 193 (S.D. Ohio 1981). Furthermore, Plaintiff fails to

present any factual allegations showing than Defendant Ganson acted under color of state law in his proposed second and third supplemental complaints and proposed amended complaint; thus, it would be a waste of judicial resources to grant Plaintiff's motions to supplement and amend his Complaint. Therefore, this Court hereby GRANTS Defendant Ganson's Motion to Dismiss pursuant to Fed.R.Civ.P.12(b)(6) and DENIES Plaintiff's motions for leave to file supplemental and amended complaints.

D. Defendants Finke and Graydon, Head & Ritchey's Motion for Summary Judgment

The Magistrate Judge determined that the claims against these Defendants involved allegations of malpractice based in state law and recommended that the claims be dismissed for lack of subject matter jurisdiction. We agree with the Magistrate Judge that there is no subject matter jurisdiction over the claims against these Defendants. First, no federal question exists. Secondly, on the face of the Complaint, Plaintiff and Defendants Finke and Graydon, Head & Ritchey are all residents of Ohio. Therefore, complete diversity among all the Parties in this action does not exist.

Because this Court agrees with the Magistrate Judge that Plaintiff's claims against the other Defendants should be dismissed, we hereby DECLINE to exercise supplemental jurisdiction over Plaintiff's claims against Defendants Finke and Graydon, Head & Ritchey. Accordingly, the claims against Defendants Finke and Graydon, Head & Ritchey are DISMISSED WITHOUT PREJUCICE pursuant to 28 U.S.C. § 1367 (c).

## II. Magistrate Judge's Report and Recommendation (doc. 63)

On August 7, 1998, the Magistrate Judge issued a Report and Recommendation (doc. 63) advising the Court to deny Plaintiff's motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure. Plaintiff thereafter objected to the report and recommendation and moved for this Court to issue an order to recuse the Magistrate Judge from this matter (doc. 64). Defendant Ganson and Defendant CBA filed responses to Plaintiff's motion for recusal (docs. 65 & 66), and Plaintiff filed a Reply (doc. 67).

First, for the following reasons, we hereby AFFIRM and ADOPT the Magistrate Judge's Report and Recommendation advising a denial of Plaintiff's motion for sanctions. Plaintiff moved the Court on June 4, 1998 to impose Rule 11 sanctions against Defendants for the filing of memoranda in opposition to Plaintiff's "First Amended Complaint of Right" (doc 45). Plaintiff argued than the Defendants' memoranda were "objectively frivolous" because "[the fundamental right of leave to amend] is justly entitled" (doc. 53). Plaintiff contended than he is entitled to file an amended complaint "as of right" under Federal Rule of Civil Procedure 15. Therefore, Plaintiff asserted than Defendants are not entitled to oppose his "First Amended Complaint of Right." Furthermore, Plaintiff asserted that Defendants filed the memoranda to harass Plaintiff and delay proceedings.

We agree with the Magistrate Judge than Plaintiff's Motion for Rule 11 Sanctions should be

denied. Plaintiff was not permitted to file an amended complaint "as of right," and there is no evidence that Defendants filed the memoranda to harass Plaintiff or to delay proceedings. Rule 15 provides, in pertinent part:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Fed.R.Civ.P. 15(a). In this case, Defendant Ganson filed a responsive pleading on December 9, 1996 and Defendant Graydon Head & Ritchey filed a responsive pleading on February 20, 1997. Thus, Plaintiff was no longer entitled to amend his Complaint "as a matter of course" on April 10, 1998. Instead, Rule 15 requires Plaintiff to obtain leave of Court or written consent of the adverse party. Accordingly, Plaintiff's Motion for Rule 11 Sanctions is DENIED.

Secondly, this Court also DENIES Plaintiff's motion for an order directing the recusal of Magistrate Judge Timothy S. Hogan from this matter (doc. 64). Under 28 U.S.C. § 455(a), recusal is required whenever a judge's "impartiality might reasonably be questioned." See also Liteky v. United States, 510 U.S. 540, 555-58 (1994) (finding that opinions formed by a judge on the basis of facts introduced or events occurring during prior or current proceedings do not give rise to a claim of judicial bias unless the opinions

"display a deep-seated favoritism or antagonism than would make fair judgment impossible"; United States v. Sammons, 918 f.2d 592, 599 (6th Cir. 1990) (holding that the trial judge's participation in prior proceedings involving the defendant did not support the defendant's demand for recusal).

Plaintiff alleges judicial bias and points to the facts that Magistrate Judge Hogan once worked in the Hamilton County Court of Common Pleas and that Magistrate Judge Hogan currently presides over two cases in the federal court system in which Mr. Koukios is the plaintiff. We find Plaintiff's motion unpersuasive. Plaintiff failed to present any evidence to establish that the Magistrate Judge holds any personal bias or prejudice against him or in favor of Defendants. Plaintiff also did not show that the Magistrate Judge acquired any knowledge about this case or interest in this case merely by virtue of his past position as a judge in the Hamilton County Court of Common Pleas or because he is allegedly assigned to another federal case in which Plaintiff is involved. Accordingly, Plaintiff's motion for an order directing the recusal of Magistrate Judge Hogan is hereby DENIED.

## CONCLUSION

The Court reviewed the complete file de novo, pursuant to 28 U.S.C. § 636, and we find the Magistrate Judge's Reports and Recommendations, dated June 10, 1998 and August 7, 1998, to be correct. For the reasons stated above and in the Magistrate Judge's Reports and Recommendations, we hereby DENY Plaintiff's objections.

Accordingly, we AFFIRM and ADOPT the Reports and Recommendations of the Magistrate Judge and GRANT the Motion to Dismiss by Defendants Supreme Court of Ohio Office of Disciplinary counsel and Sally Ann Steuk; the Motion to Dismiss by Defendants Cincinnati Bar Association and Edwin Patterson, III; and the Motion to Dismiss by Defendant Michael Ganson. In addition, this Court DISMISSES WITHOUT PREJUDICE the claims against Defendants Graydon, Head & Ritchey and Harry J. Finke pursuant to 28 U.S.C. § 1367(c) and DENIES AS MOOT Defendants' Summary Judgment Motion. Finally, Plaintiff's motion for Rule 11 sanctions and the recusal of the Magistrate Judge are DENIED.

SO ORDERED.

Dated: 3/16/99

/s/S. Arthur Spiegel
S. Arthur Spiegel
United States Senior District Judge

## APPENDIX Z

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

EVANS KOUKIOS, )
) Appeal Nos. C-010735
) C-020091
)
Defendant. ) Volume 1 of 1

- - -

TRANSCRIPT OF PROCEEDINGS

- - -

APPEARANCES:
(NO ONE PRESENT.)
On behalf of the Plaintiff.
KAREN T. DUNLEVEY, ESQ.
On behalf of the Defendant.

- - -

BE IT REMEMBERED that upon the Hearing of this cause, on December 17, 2001, before the Honorable Judge Robert P. Ruehlman, said Judge of the said Court of Common Pleas, the following proceedings were had.

INDEX


DEFENDANTS' WITNESSES

| | PAGE | LINE |
|---|---|---|
| HARRY J. FINKE IV, ESQ. | | |
| Direct Examination by Ms. Dunlevey | 7 | 12 |
| ROBERT A. PITCAIRN, JR., ESQ. | | |
| Direct Examination by Ms. Dunlevey | 10 | 14 |

DEFENDANTS' EXHIBITS

Defendants' Exhibit Ganson 1 - Affidavit - Marked for identification Page 6 Line 15. Admitted Page 6 Line 17.

Defendants' Exhibit A - Attorney Fees - Marked for identification before trial. Admitted Page 10 Line 8.

Defendants' Exhibit B - Fees and Disbursements - Marked for identification before trial. Admitted Page 10 Line 8.

MORNING SESSION, DECEMBER 17, 2001

THE COURT: Let's do Evans Koukios versus Michael Ganson, et al, A-9902104. This is on the issue of sanctions and attorney fees. Actually, I already found sanctions against him. So now the issue is really on attorney fees, right? We have given him over a half hour to show up. It is 9:32, so we waited. I knew you were here, I wanted to make sure, you know, but I wanted to be fair to him. I always give everybody about a half hour for reasons -- he knew to be here now. Plus he sent things to us all saying he won't be here, right? Is that the same thing you got?

MR. LOCKEMEYER: I think we did receive some correspondence to that effect. I received a fax this morning, early this morning. Motion to not go forward with that hearing based upon the fact he's removed his action to Federal Court.

THE COURT: He can't, he's the plaintiff.

MR. LOCKEMEYER: I understand, Your

Honor, I'm just telling you what was said in the --

THE COURT: I got no order from the Federal Court.

MS. DUNLEVEY: No.

THE COURT: If the Federal Court says not to proceed I won't. Have you gotten an order?

MR. LOCKEMEYER: No, I received nothing.

THE COURT: You got the same thing, basically. What else did you get this morning, something else?

MR. LOCKEMEYER: Just that motion to not go forward.

THE COURT: You can put an entry on, I'll deny all the motions. He filed a bunch of motions. It is all related to Federal Court. Federal Court has not told me not to proceed. Make the appropriate entries to that. They are all overruled.

And are you ready to proceed on this issue?

MR. LOCKEMEYER: Yes, Your Honor.

The only other thing I would inform the Court, I spoke to Mr. Gora, representing the Cincinnati Bar Association. He made a decision not to participate in this, and wanted me to let you know he will be not here as a defendant because he was dismissed -- well, a long time ago, and was affirmed by the Court of Appeals and presently is in the Supreme Court. And he doesn't believe he has any issues at this time.

THE COURT: Okay. All right. Do you want to do this? Do the same --

MR. LOCKEMEYER: No, actually --
THE COURT: I didn't think, so. Okay.
MR. LOCKEMEYER: I have something to also submit to the Court.
THE COURT: This won't take long. You got the Grand Jury out there, this won't take long.
MR. LOCKEMEYER: I have an affidavit from Nicholas Bunch, who is an attorney here in town, who has reviewed the bills and has the opinion that these are reasonable and they are in defense of Mr. Ganson. And I have attached the copy of all the bills that we have which has the matter of what was done, the hourly rate and the amount. The total is $19,552.54.
THE COURT: 19,55 --
MR. LOCKEMEYER: 2.54.
THE COURT: 54.
MR. LOCKEMEYER: That's right. He's not here to object to it.
THE COURT: Do you have any other witnesses you want to present on this?
MR. LOCKEMEYER: No.
THE COURT: Okay. I'll accept that.
MR. LOCKEMEYER: Thank you, Your Honor.
(Defendant Ganson's Exhibit 1 was marked for identification.)
(Defendant Ganson's Exhibit 1 was admitted into evidence.)
THE COURT: And I'll grant it.
MR. LOCKEMEYER: Nothing further on behalf of Mr. Ganson.
THE COURT: $19,552.54. Give me an entry. That's attorneys fees for defendant

Ganson?
MR. LOCKEMEYER: Yes, sir.
THE COURT: Do you have an entry now?
MR. LOCKEMEYER: I'll prepare it.
THE COURT: Along with the entry overruling?
MR. LOCKEMEYER: Yes, sir.
THE COURT: What do you have?
MS. DUNLEVEY: Two witnesses on behalf of Graydon Head & Ritchey.
HARRY JACK FINKE, IV, ESQ.
having been first duly sworn, was examined and testified as follows:
DIRECT EXAMINATION
BY MS. DUNLEVEY:
Q. Please state your name for the record.
A. Harry Jack Finke, the Iv.
Q. Where are you employed?
A. Partner with Graydon Head & Ritchey, LLP, law firm.
Q. In your employment as partner with Graydon Head & Ritchey, do you have responsibilities for reviewing and approving bills that come in for attorney fees provided to your firm?
A. With respect to risk management matters I do, and that would include this case.
Q. I'll hand you what we have marked as Exhibit A.
THE COURT: On the other matter, with this affidavit, we will make this part of the record, call it Defendant Ganson 1. It is accepted as Exhibit A.
MS. DUNLEVEY: Correct.
Q. Mr. Finke, do you recognize that document?

A. I do.
Q. Those documents?
A. Yes.
Q. What are they?
A. These are copies of bills from Bieser, Greer & Landis to Graydon Head & Ritchey in connection with this case.
Q. And are there some minor redactions made to those bills?
A. There are. Which I believe were done by your firm to redact attorney/client privilege matters.
Q. And to your knowledge, have all of those bills been paid currently?
A. The only one I am not sure about is the one dated December 12, 2001. I know all the others have been. And I know we received the December 12, 2001 -- it is in the process of being paid and will be paid.
Q. And if you can look at the last four pages of Exhibit A.
A. Okay.
Q. Some of those are documents that were incurred during the month of December, but were not yet billed?
A. Yes, that's my understanding.
Q. And I'm going to hand you what has been marked as Exhibit B. Mr. Finke, do you recognize that document?
A. Yes, I do. It is a summary of the bills submitted. These are from Landis to my firm and were paid. Or in the process of payment by my firm.
Q. And can you tell me what the total fees and expenses were up until this Friday?
A. $53,001.32.
MS. DUNLEVEY: That's all I have for

this witness, Your Honor.
THE COURT: Okay. Nobody here to cross-examine you, so thank you. I'll make this part of the record. Submit these as part of the record, and I'll submit them into evidence.
THE COURT: That's a A and B?
MS. DUNLEVEY: Yes.
THE COURT: Give them to my court reporter.
(Defendants' Exhibits A and B were admitted into evidence.)
MS. DUNLEVEY: Call Robert Pitcairn.
ROBERT PITCAIRN
having been first duly sworn, was examined and testified as follows:
DIRECT EXAMINATION
BY MS. DUNLEVEY:
Q. Could you please state your name for the record?
A. My name is Robert A. Pitcairn, Junior.
Q. And where are you employed, Mr. Pitcairn?
A. Katz Teller Brant & Hild.
Q. And how long have you been practicing law in the Cincinnati area?
A. Twenty-eight years.
Q. And what is the focus of your practice?
A. The focus of my practice is civil litigation, primarily commercial litigation. And I have been involved many times in types of issues that are involved in this case.
Q. And have you been admitted as an expert witness to testify with respect to reasonableness and appropriateness of attorney

fees before?
A. I have.
Q. How many times have you done that?
A. I can't tell you off the top of my head, but I have been engaged as an expert witness in excess of a dozen times.
Q. If you can take a look at Exhibits A and B that are in front of you, have you seen these documents before?
A. Yes, ma'am.
Q. Based upon your experience, are you able to formulate an opinion with respect to whether the attorney fees represented in those documents are reasonable and appropriate to the subject matter of this litigation?
A. Yes, I am.
Q. What is that opinion?
A. I believe they are extremely reasonable and appropriate.

MS. DUNLEVEY: That's all I have, Your Honor.

THE COURT: Okay. Anybody here to cross-examine him?

He's a very respected attorney in town, very respected. Very good attorney. So, I'll accept his opinion as an expert, granting judgment of $53,001.32.

MS. DUNLEVEY: That's correct.

The COURT: I also give -- sorry to have you wait so long. I always give them a half hour. Anyway, I have been -- we have been more than fair.

You will both present entries to that effect?

MR. LOCKEMEYER: Yes, sir.

MS. DUNLEVEY: Yes, sir.

THE COURT: $72,552.86. Hopefully,

that will send a message to people that file frivolous suits. I'm surprised it took so long. It's been happening around this courthouse too long. Actually, we can file -- there is another thing you can do, too, you can do a certification to the presiding judge. We have ruled on that. There has been a couple of people that have been -- some of these right-wing groups that file these crazy lawsuits.

MR. LOCKEMEYER: Vexatious litigators.

THE COURT: You can file where the clerk is notified, and anytime they try to file -- Morris May, he's one of them. There is a couple of them that are like that that are considered vexatious litigators.

If you want to check into that, you can file something on that. It might stop him from future filings against other people.

MR. LOCKEMEYER: I have a feeling we may be next.

THE COURT: Yeah. So, I would consider -- you might go to the clerk's office on that. The clerk's office knows the forms for that. We have vexatious litigators. There is a procedure to go through. I think this pretty much qualifies.

MR. LOCKEMEYER: You noticed in the last affidavit he reported us, all of us to the disciplinary council to the Bar Association.

THE COURT: He's done that to me. They just keep rejecting it. I think I got

eight or nine complaints already. Supreme Court just won't take me off the case. So, yeah, they are tired of listening to him, too.

MR. LOCKEMEYER: Thank you, Your Honor.

MS. DUNLEVEY: Thank you, Your Honor.

THE COURT: He didn't show up today. All right. Thanks.

(PROCEEDINGS CONCLUDED.)

CERTIFICATE

I, BARBARA E. LAMBERS, RMR, the undersigned, an Official Court Reporter for the Hamilton County Court of Common Pleas, do hereby certify that at the time and place stated herein, I recorded in stenotype and thereafter transcribed the within 15 pages, and that the foregoing Transcript of Proceedings is a true, complete, and accurate transcript of my said stenotype notes.

IN WITNESS WHEREOF, I hereunto set my hand this 5th Day of June, 2002.

_____

Official Court Reporter
Of Common Pleas

(2)

No. 03-921

Supreme Court, U.S.
FILED
MAR 2 6 2004
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

Evans Koukios, pro se

**Petitioner**

**v.**

Michael Ganson, L.P.A./Mr. Michael Ganson;
Graydon, Head and Ritchey, L.L.P/Mr. Harry J. Finke;
Cincinnati Bar Association /Mr. Edwin W. Patterson III

**Respondents**

**ON PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT AND THE
HAMILTON COUNTY FIRST DISTRICT COURT OF APPEALS**

## PETITION FOR REHEARING FOR WRIT OF CERTIORARI

**Evans Koukios**
**Pro Se**
**4260 McNay Court**
**West Bloomfield**
**Michigan 48323**
**248-538-4588**

**Does the supremacy clause of the United States Constitution, Article VI, Sec. 2 and 3, impose a duty on states to regulate the conduct of their attorney bars to a standard, definable by the United States Constitution?**

**Does the supremacy clause of the United States Constitution, Article VI, Sec. 2 and 3, impose a duty on appellate courts, including the U.S. Supreme Court, with respect to mandatory jurisdiction to protect the U.S. Constitution and federal law?**

**Does the supremacy clause of the United States Constitution, Article VI, Sec. 2 and 3, protect the inalienable and U.S. constitutional right of self representation in the nation's courts?**

## PARTIES TO THE PROCEEDING

**Petitioner**

Evans Koukios, pro se

**Respondents**

Michael Ganson, L.P.A./Mr. Michael Ganson; Graydon, Head and Ritchey/Mr. Harry J. Finke;
Cincinnati Bar Association /Mr. Edwin W. Patterson III;

## APPENDIX FROM ORIGINAL PETITION FILED DECEMBER 23, 2003 AND APPENDIX AA

Appendix A: Order of First District Court of Appeals, April 2, 2003, page 1a.

Appendix B: Order of the Hamilton County Court of Common Pleas denying motion for findings of fact and vacation of order of December 17, 2001 and requiring bond of $106,002.64 and $39,103.08, entered January 16, 2002, page 6a.

Appendix C: Order of Hamilton County Court of Common Pleas entering for $19,551.54 for attorneys fees to Michael Ganson, L.P.A., entered December 20, 2001, page 8a.

Appendix D: Order of Hamilton County Court of Common Pleas entered order for $53,001.32 to GHR, LLP, entered December 20, 2001, page 9a.

Appendix E: Order Granting summary judgment with no reasons appearing in the grant, entered Nov. 2, 2001, page 11a.

Appendix F: Order Granting Motion to Dismiss with no reasons appearing in the grant, entered September 18, 2001.

Appendix G: Order Granting Motion to supplement motion for summary judgment after hearing for Civil Rule 56 motion, entered November 2, 2001, page 13a.

Appendix H: Filing made concurrently in the United States District Court, Southern District of Ohio, first page, of Fed.R.60(B) motion and Notice of the Removal from the Hamilton County Court of Common Pleas, filed with the Clerk of Hamilton County on November 20, 2001, page 14a.

Appendix I: Sua sponte order finding frivolous conduct, entered Nov. 2, 2001, page 16a.

Appendix J: Order of the Hamilton County First District Court of Appeals entered March 21, 2001, decision with regard to first appeal, page 18a, dismissing CBA on basis of res judicata and reversing dismissal of Ganson.

Appendix K: Order denying motions to compel and motion for defendants to answer the complaint, entered August 14, 2001, page 22a.

Appendix L: Entry of Disqualification of Judge Mark Schweikert for reason of membership in the Cincinnati Bar Association, September 10, 1999, page 26a.

Appendix M: Entry of decision of Chief Justice of Ohio Supreme Court on bias and prejudice of Judges of the First District Court of Appeals, entered October 17, 2000, in first appellate case. Page 28a.

Appendix N: Entry of decision of Chief Justice of Ohio Supreme Court on bias and prejudice of Judge Robert Ruehlman, entered July 19th, 2001, page 30a.

Appendix M: Entry of dismissals on basis of Civ.R. 12(b)(6) for res judicata from previous federal dismissals, entered June 22, 2000.

Appendix P: Order of U.S. Sixth Circuit Court of Appeals, October 12, 2000, from federal action.

Appendix Q: Order of U.S. Sixth Circuit Court of Appeals, August 11, 2000, opinion from federal action, page 36a.

Appendix R: Order and opinion of U.S. Sixth Circuit Court of Appeals on appeal of Fed.R. 60(b) and remand order of the district court on March 4, 2002, entered November 4, 2002, page 42a, and award of attorneys fees to CBA, that was subsequently never enforced.

Appendix S: Order of U.S. Sixth Circuit Court, en banc, denying review, entered March 24, 2003.

Appendix T: Order of Ohio Supreme Court denying stay of judgment entry of Hamilton County First District Court of Appeals, entered June 11, 2003, page 47a.

Appendix U: Order of Ohio Supreme Court denying discretionary review, finding no substantial constitutional question, entered July 30, 2003, page 48a.

Appendix V: Order of Ohio Supreme Court denying motion to reconsider, filed September 24, 2003, page 49a.

Appendix W: Order of U.S. Magistrate Judge, filed June 10, 1998 in federal action but filed in state court action by defendant Ganson and incorporated in order of trial court granting res judicata. Page 50a.

Appendix X: Order of U.S. District Court judge, filed by CBA in state court action, and incorporated in trial court's 12(b)(6) dismissal on basis of res judicata, entered March 17, 1999, page 72a.

Appendix Z: Transcript of Dec. 17, 2001 proceeding in the state court before Judge Robert Ruehlman, who proceeded in the state court with Ganson, GHR and CBA, despite removal and appearance of counsels for these defendants in U.S. District Court to file for order of remand that was not issued until March 4, 2002, said order being appealed to the U.S. Sixth Circuit Court of Appeals. Page 89a.

Appendix AA: *Christina Hood v. Prime Time Rentals, Inc.*, Appeal No. 01A01-9807-CH-352

## OPINIONS BELOW

The order of the First District Court of Appeals of Hamilton County Ohio, entered April 2, 2003, printed in Appendix A, that is the final court in the state to enter an order on the record of this case.

The orders of the lower trial court are printed in the Appendix, as well as the orders of the Ohio Supreme Court with respect to its rulings of bias and prejudice entered in the case, as well as federal opinions incorporated by the trial court in its initial rulings of the res judicata effect of a prior federal court action in the United States District Court, Western Region of Ohio and the decisions of the U.S. Sixth Circuit Court of Appeals.

## JURISDICTION

The order denying discretionary review was entered by the Ohio Supreme Court on July 30, 2003 (App. U) from the judgment of the Hamilton County First District Court of Appeals entered on April 2, 2003 (App. A). A motion for rehearing was timely filed with the Ohio Supreme Court, which motion was denied on September 24, 2003 (App. V). Petitioner states that the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257, to review this petition for certiorari.

Petitioner further states that 28 U.S.C #1291 and 28 U.S.C. #1447(d), that incorporates section 1443 of the U.S. Code providing that "...an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise", is additionally applicable to the instant appeal.

Petitioner filed a Petition for Writ of Certiorari on December 23, 2003. On January 7, 2004, respondents Cincinnati Bar Association, et al. filed a waiver of right to respond by Felix J. Gora. On January 13, 2004, respondents Graydon Head, et al. filed a waiver of right to respond by Karen T. Dunlevey. On January 14, 2004, respondents Michael Ganson L.P.A. et al. filed a waiver of right to respond by David S. Lockemeyer. On February 11 2004 the petition was distributed for Conference of February 27, 2004 and on March 1, 2004 the petition for writ was denied.

Supreme Court Rule 44(2), Rehearing, provides jurisdiction for the rehearing of an order denying a petition for a writ of certiorari if filed within 25 days after the date of the order of denial. Grounds for rehearing shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. The petition shall be presented together with

certification of counsel (or of a party unrepresented by counsel) that it is restricted to the grounds specified and is presented in good faith and not for delay.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### U.S. Constitution, Article VI, Sec. 2 and 3 :

This Constitution, and the Law of the United States which shall be made in Pursuance thereof; ...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding...and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution....

## TABLE OF AUTHORITIES

*Ceramco, Inc. v. Lee Pharmaceuticals* , 510 F.2d 268, 271 (2d Cir. 1975), p. 4

*Cheney v. U.S. District Court for the District of Columbia*, 03-475, p. 5

*Columbus Bar Assn. v. Elsass* (1999), 86 Ohio St.3d 195, p. 6

*Christina Hood v. Prime Time Rentals, Inc.*, Appeal No. 01A01-9807-CH-352, Tennesee Court of Appeals, page 2

*Faretta v. California* , 422 U.S. 806 (1975), p. 6
*Fogerty v. Fantasy*, Inc., 510 U.S. 517 (1994), p. 4

*Hecht v. Levin* (1993), 66 Ohio St.3d 458, p. 6

*In re Integration of the Nebraska State Bar Assn.* (1937) 133 Neb. 283, p. 4

*Magnum Import Co. v. Coty*, 262 U.S. 159, p. 3

*Mansfield, Coldwater & Lake Michigan Railway Company & Another v. Swan & Another*. 111 U.S. 379, p. 2

*Musicus v. Westinghouse Elec. Corp.* , 621 F.2d 742, 744 (5th Cir. 1980), p. 4

*Peaseley v. Virginia Iron, Coal & Coke Co.*, 282 N.C. 585, 194 S. E. 2d 133 (1973), page 3

*Ross v. Moffitt*, 417 U.S. 600 (1974), p. 2

Supreme Court Rule 15, page 1
U.S. Constitution, Article VI, Sec. 2 and 3, p. 1-10
U.S. Constitution, PREAMBLE, page 2.
*Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886), p. 8

## ARGUMENT

Art. VI, Sec. 2 and 3 reads in part: "This Constitution, and the Law of the United States which shall be made in Pursuance thereof; ...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby...." This is given effect by appellate courts and every case presenting to a higher court with supremacy problems must be conformed. Discretionary criteria for appellate jurisdiction are not relevant when such problems exist.

The state trial court was never bound as constitutionally required. The description of facts, argument and record presented in Petitioner's Writ for Certiorari is accurate. Respondents filed waivers under Rule 15. There are no misstatements of fact or law and the record describes an abject failure of due process in every level of both federal and state court administration inferior to the U.S. Supreme Court. That courts produce irrational judgments is evidence that a constitutionally inadequate system exists for regulating the conduct of attorneys that violates principles of rationality. Justice cannot be found without truth and truth cannot be found without rationality. The framers of the constitution were not irrational.

The record describes a period of thirteen years beginning with a breach of a constitutional agreement by Ohio attorney Ganson to deny Petitioner access to the courts of Ohio. It culminates with on-going retaliation against the Petitioner by the seizure of his house by his own attorneys, GH&R. As either Ganson or GH&R or both are liable for Petitioner's damages, recovery is required in the action. The presence of the third defendant, the Cincinnati Bar Association, awarded immunity from requiring rationality in the conduct of attorneys shows why only irrational judgments emanate from court process additionally flawed by invidious discrimination based on Petitioner's U.S. constitutional right to represent himself. Appellate integrity is absent with harassment during appeals, the pro se appellant will not be

given regular calendar review, and constitutional issues raised in his appellate briefs are never mentioned in any court decision, including the constitutional issue of pro se representation raised in the complaint.

Finally, Petitioner removed the collateral jurisdiction of sanctions to the U.S. District Court, only to have Ohio's bar and appellate courts brutally injure Koukios and his family during the pendancy of appeals. Where jurisdiction did not exist, the appellate court should have announced the fact and dismissed the lower court's unauthorized process. See *Mansfield, Coldwater & Lake Michigan Railway Company & Another v. Swan & Another*. 111 U.S. 379. Ohio conflicts with every other state in the union. See *Christina Hood v. Prime Time Rentals, Inc.*, Appeal No. 01A01-9807-CH-352, Appendix AA.

Art. VI requires that "all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution....". This clause shows the second appearance of the word "bound" and uses the word "all". It necessarily includes the judges of the U.S. Supreme Court. Finding constitutional need for promissory oaths, the Act of Congress of 1789 began regulating the time and manner of administering oaths. Public trust required "all" to "solemnly swear or affirm" to "truly and faithfully" discharge their duties of office, "to the best of their knowledge and abilities", to "support the constitution". Federal judges had to swear the "obligation freely, without any mental reservations or purpose of evasion." The framers of the constitution mandated a public conscience and moral obligation to abide by an ethical code of conduct as the PREAMBLE had high purpose: "We, the people of the United States, in order to form a more perfect Union, establish justice... and secure the blessings of liberty to ourselves and our posterity..." This starting point requires certiorari in the U.S. Supreme Court.

Moreover, in the context of Art. VI, Supreme Court decisions like *Ross v. Moffitt*, 417 U.S. 600 (1974) are in

conflict and the principles in their dissents must be revisited. The majority believed that second-tier, discretionary appellate review could be meaningfully handled pro se. This they reasoned was even true when the state Supreme Court believed the decision of the Court of Appeals was incorrect, citing *Peaseley v. Virginia Iron, Coal & Coke Co.*, 282 N.C. 585, 194 S. E. 2d 133 (1973). This analysis is in error. The only proper function of appellate courts is to conform decisions to the constitution and the law. Art. VI.

The doctrine of Art. VI. protects for "due process" fairness between the State and the litigant, and "equal protection" fairness that corrects disparity in treatment by the State and the dissent in Moffit concludes that an adequate appellate review does not exist when "permissive" review is available but a litigant cannot adequately take advantage of such review. It cites to *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 and its criteria for U.S. certiorari, "first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort." The dissent noted, however, that:

> "`Certiorari proceedings constitute a highly specialized aspect of appellate work. The factors which [a court] deems important in connection with deciding whether to grant certiorari are certainly not within the normal knowledge of an indigent appellant. Boskey, The Right to Counsel in Appellate Proceedings, 45 Minn. L. Rev. 783, 797 (1961) (footnote omitted).'" 483 F.2d, at 653.

The ordinary knowledge of citizens is that appellate courts correct lower courts. Art. VI speaks to no discretionary criteria, special knowledge nor duty upon appellants to present argument on matters outside of their knowledge. To lay citizens, judges are always be bound and it is the failure to apply this doctrine that leads to crowded dockets. If there was absolute integrity in society there would be no law suits, absolute integrity at the trial level no

appeals, and absolute integrity at the first tier appellate level, no discretionary appeals.

Respondents, therefore, cannot be drenched in the appearance of impropriety for they, too, hold public trust. There is a difference between civil procedure and the misconduct of attorney-bar brutality. If Respondents were required to file a responsive brief **or** their counsels were ordered to show cause why they should not be disciplined, the responses would be identical and lead to disqualification. "An attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course. The[lawyer] cannot serve two masters; and the one [he has] undertaken to serve primarily is the court." *In re Integration of the Nebraska State Bar Assn.* (1937) 133 Neb. 283, 289.

Whereas a reasoned discussion of federal court attorneys fees occurs in *Fogerty v. Fantasy*, Inc., 510 U.S. 517 (1994), there is no reasoned analysis, nor can there be, for the award of the Respondents' federal court attorneys fees by a judge in a foreign state court. Following removal, Respondents had the opportunity to present their invoices to the U.S. District Court and assessed as in *Fogerty*, *ibid.* To appear ex parte, however, in a state courthouse when its Clerk had been ordered by federal law not to proceed is violate and oath and the dignity of the courthouse.

Both state and federal systems denied motions to disqualify these dastardly counsels. On principles of Art. VI, the public trust was being violated and disqualification should have been immediate and the penalties severe in both court systems. A trial judge is required to take measures against unethical conduct occurring in connection with any proceeding before him. *Musicus v. Westinghouse Elec. Corp.* , 621 F.2d 742, 744 (5th Cir. 1980). It is his duty and responsibility to disqualify counsel for unethical conduct prejudicial to counsel's adversary. *Ceramco, Inc. v. Lee Pharmaceuticals* , 510 F.2d 268, 271 (2d Cir. 1975) and no

undisciplined attorney should have passed to higher appellate levels to disrupt the dignity of those processes. All judges in all courts must be bound to the U.S. Constitution, including courts of last resort. Art. VI, U.S. Constitution.

The law clerks and justices will note that since the filing of Petitioner's petition, many events show a changing climate for deciding certiorari. First, this court granted certiorari in *Cheney v. U.S. District Court for the District of Columbia*, 03-475, on Dec. 15, 2003, briefs of Respondents and Amici were filed in March, 2004, and a Memorandum of Justice Scalia was filed March 18, 2004. Certiorari was granted on a discovery dispute where the Vice President seeks a grant of immunity from the judicial process of discovery. Petitioner adopts by reference the Respondent and Amici filings in that case as Petitioner has the same issues in his appeal.

Under equal protection, Petitioner should be entitled to the same certiorari of his discovery issues that center on public trust violations. Art. VI. The state court judge stated his discriminatory reasons for providing discovery immunity to Respondents, members of a class of legal professionals:

MR. KOUKIOS: Can you state why the motion to compel is being denied? There is a motion to compel against Graydon, Head & Ritchey, and there is no motion to dismiss.
THE COURT: Right. Motion to compel is overruled because, basically, you don't know what the heck you're doing, that's the real reason. You know, you're not a lawyer. You don't know what you're doing. You're filing ridiculous motions, and that's what happens when you try to represent yourself. But I am not going to teach you how to be a lawyer or teach you how to practice law. So that's it, next case.

In Justice Scalia's March 18, 2004 Memorandum, friendships and relationships are disclosed between members of the Court and private and official capacity defendants, including lawyers practicing before this Court. Under certain circumstances recusal is required and the basis is Art. VI. In

Petitioner's case, there are a multitude of friendships and relationships between the judges and the Respondent parties and their counsels. In fact, the first judges assigned in both the federal and state court complaints recused because of their membership in the Cincinnati Bar Association.

Certiorari itself can be errantly based on these prejudicial factors having to do with relationships and not just on the substance of legal questions. The Ohio Supreme Court prejudicially failed to review Petitioner's case, the U.S. Sixth Circuit Court of Appeals and the Hamilton County Court of Appeals entered non-publishable opinions with little analysis, and prejudicial factors against certiorari can exist in the U.S. Supreme Court. It is unconstitutional to deny certiorari because of a prejudiced view that extension of *Faretta v. California* , 422 U.S. 806 (1975) to civil cases is not to the liking of Supreme Court justices. The Supreme Court can't ignore "constitutional avoidance" in the Cheney case and ignore the real "constitutional avoidance" in Petitioner's case, because of prejudices that cannot be overcome by real biases and prejudices in the Court.

There has been a de-humanizing effect against Petitioner from years of abusive procedure against this civil rights plaintiff by the legal profession that cannot even be described in his petitions. *Columbus Bar Assn. v. Elsass* (1999), 86 Ohio St.3d 195 and *Hecht v. Levin* (1993), 66 Ohio St.3d 458 shows the prejudice problem in greater detail. In *Hecht*, the Ohio Supreme Court determined that a citizen who files an attorney grievance has an absolute privilege against a civil action against him based on that filing. Petitioner should be in the same position and have protection of immunity. In *Columbus Bar Assn. v. Elsass*, the Ohio Supreme Court found that a lawsuit filed by Elsass against a grievant "was unwarranted and harassing, and that his conduct violated DR 1-102(A)(5) (engaging in conduct prejudicial to the administration of justice), 7-102(A)(1) (filing a suit, asserting a position, or taking action knowing

that such action would serve merely to harass or maliciously injure another)". Petitioner has been maliciously injured.

But the dissent in *Hecht*, *Id.* was written by Judge Pfeifer who currently sits on the Ohio Supreme Court who wrote: "In the business of practicing law, reputation is a successful attorney's greatest asset. To leave something of such value open to the prey of the malicious makes little sense." This prejudice is concealed but lurks so strong that is revealed by judicial infliction of injury. Petitioner is not even allowed to protect his good name from subsequent defamation. Ms. Dunlevey, who has appeared in this Court, aptly shows in her well-received argument to the prejudiced judges of the First District Court of Appeals:

> Furthermore, the Appellant's suggestion that the reproduction of the Court's Judgment Entry on the Internet has damaged his health, caused serious emotional distress to him and his family, has inflicted irreparable damage and is an example of "bar brutality" is nothing short of absurd. Koukios has voluntarily pursued this litigation for approximately nine years, filing literally hundreds of motions on non-issues such as the one currently before this Court. To the extent that any abuse of the system has occurred, we submit that Koukios is the abuser, as opposed to the victim.

The record contains no frivolous motions on non-issues and Ms. Dunlevey does not have truth as a defense to her defamation. Her statement is hocus-pocus, "to cheat or take surreptitiously" this litigant's good name, and is unbecoming conduct for a member of this Court's bar. The invidious discrimination has turned ugly. It is not the Cincinnati Bar Association and other official Respondents that are immune from suit and discovery, but Petitioner who has demonstrated that the administration of a law is "directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive" that the system of prosecution

amounts to "a practical denial" of equal protection of the law. *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886).

Second, Martha Stewart was convicted March 5, 2004 as felon in a U.S. District Court. Securities defense lawyers advised the public that citizens should not speak with government attorneys. Stewart's lawyers said they would appeal to explain where the case went wrong, but it was reported Ms. Stewart will likely serve her sentence before her appeal of right is determined. In a written decision in the case, U.S. District Court Judge Cederbaum dismissed a count of the indictment carrying a 10 year prison term because government attorneys did not produce sufficient evidence for the count to go to jury, a ruling akin to a Civil Rule 11 violation found after trial. Stewart's publicly traded company suffers tremendous economic damage. The central issue of the case focus on a 28 year old assistant stockbroker, working in his professional capacity for Merrill Lynch, who failed to apply principles of professional ethics. Rosie O'Donnell issued a statement saying, "I am outraged and beside myself. This is a travesty. Shame on the federal government."

In connection to this widely publicized legal event, the U.S. Supreme Court is a branch of the federal government responsible for every inferior court decision in the nation. It is also responsible for the professional conduct of the nation's judges and lawyers. Art. VI. Reported in Boston University Community's Weekly Newpaper, Week of 19 March 2004 · Vol. VII, No. 24,www.bu.edu/bridge:

> The March issue of The American Lawyer says that law professors at Harvard, New York University, and other schools blame their schools' lack of response to Enron and other corporate scandals on the tradition of downplaying professional responsibility and other practice-oriented courses. "Law schools don't pay any attention to [legal] ethics," says Susan Koniak, a LAW professor of law instruction in the J. D. Program.

Ethics is important to the country and the Supreme Court can take jurisdiction of this issue in this record. The Cincinnati Bar Association and professional attorneys are defendants, and the Court can fully study and air the professional ethics questions of Ohio's bar. Many citizens agree with Rosie O'Donnell that the proper operation of the law does not always occur to protect citizen rights.

In fact, talking to personnel at the Supreme Court, Petitioner learned that many state supreme courts send reports to this Court so that disciplined attorney names can be checked against a master list of members of the Supreme Court's bar to ascertain whether membership should be revoked. The state courts reports are then **shredded**. It is not reasonable for public records, capable of being analyzed for guidance in improving court functioning, to be **shredded** by the most important supervisory body in the country. Even its master list of member attorneys is not a public record, despite its potential to assist those in need of obtaining the best petitions for getting a grant of certiorari. Where the Supreme Court is constitutionally mandated by Art. VI to take certiorari, it appears to be doing that which defeats it. The need for certiorari in Petitioner's case is shown by the Court's own conduct.

A third event to consider is described in a March 18, 2004 article following Mayor Gavin Newsom's issuance of same-sex marriage licenses in San Francisco:

(AgapePress) - U.S. Supreme Court Justice Antonin Scalia says issues of homosexual marriage will likely end up before the highest court in the land...In an address to a crowd of several hundred at the College of William & Mary in Virginia, Scalia said the court will likely have to determine whether laws in one state must be recognized in another state.

The issue, however, is playing out under Art. VI www.bu.edu/bridge, id:

Supporting gay marriages may be a smart move for certain politicians, says Jack Beermann, a LAW professor of law instruction, J. D. Program, but it is still unusual for government officials to defy the law to influence social change. "There is a respectable view that government officials should not engage in civil disobedience, that they should resign if they feel that the law is so unjust that they shouldn't follow it," says Beermann. "But I think the motivation of some of these officials is that they also take an oath to uphold the Constitution, and the Constitution is the supreme law of the land. They feel . . . their higher duty is to the Constitution."

Thus, rehearing with Art. VI at the forefront of Supreme Court consideration is more relevant to citizens of the country and jurisprudence itself.

## CONCLUSION AND CERTIFICATE OF GOOD FAITH

At an earlier time, the Taney Court was not able to handle the societal concerns in the Dred Scott case, and Congress and the people found the 12th, 13th and 14th amendments to the Constitution. Indeed, President Lincoln appointed Salmon P. Chase Chief Justice to carry forth this constitutional mandate, earlier expressed by Lincoln in the Emancipation Proclamation. The American spirit is traced to inalienable rights and equality, and citizens like Benjamin Franklin who, though himself not a lawyer, signed both the Declaration of Independence and the U.S. Constitution. Certiorari should be granted for final determination on the good grounds of this Petition to protect the Constitution.

Petitioner Evans Koukios further certifies that on this 26th day of March, 2004, I have served by U.S. Mail copies of this good faith Petition for Rehearing, restricted to the grounds in S.C. Rule 44(2), on all opposing counsel who have appeared in this action, and have no purpose of delay, but only purpose of certiorari in the U.S. Supreme Court.

/s/_____
Evans Koukios, Pro Se

**APPENDIX AA**

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

CHRISTINA HOOD
Plaintiff/Appellant, v.

Davidson Chancery
PRIME TIME RENTALS, INC.,
Defendant/Appellee.

No. 98-1611-I
Appeal No.01A01-9807-CH-352

APPEAL FROM THE CHANCERY COURT FOR
DAVIDSON COUNTY AT NASHVILLE, TENNESSEE
THE HONORABLE CLAUDIA BONNYMAN,
SPECIAL CHANCELLOR PRESIDING

RICHARD J. BRAUN
501 UNION STREET
SUITE 500
NASHVILLE, TENNESSEE 37219
ATTORNEY FOR PLAINTIFF/APPELLANT

JACK, LYON & JONES
PHILLIP K. LYON
BRUCE H. PHILLIPS
11 MUSIC CIRCLE SOUTH, SUITE 202
NASHVILLE, TENNESSEE 37203
ATTORNEYS FOR DEFENDANT/APPELLEE

REVERSED AND REMANDED
PATRICIA J. COTTRELL, JUDGE
CONCUR: CANTRELL, J.,KOCH, J.

**FILED**
**March 31, 1999**
**Cecil Crowson, Jr.**
**Appellate Court Clerk**

Footnote 1. Appellee, Defendant below, has filed with this Court a "Notice of No Opposition to Appeal" in which Appellee states it has no opposition to the relief sought by Appellant.

OPINION

The Plaintiff, Christina Hood, appeals the dismissal of her complaint and the imposition of court costs in state court, following the removal of her suit to federal court by the Defendant. In this appeal Plaintiff asserts that, under 28 U.S.C. §1446(d), once a case is removed to federal court, state court has no authority to dismiss a case or assess costs, unless and until the case is remanded. We agree.

Plaintiff filed a complaint in Davidson County Chancery Court against her former employer, Prime Time Rentals Inc. On June 26, 1998, Defendant filed a Notice of Removal and removed this action to the United States District Court for the Middle District of Tennessee. On June 29, 1998, the state trial court entered an order dismissing this action and assessing costs against the Plaintiff. Plaintiff now appeals claiming that the state court lacks authority to enter such an order. In the alternative Plaintiff claims that her constitutional rights to due process and equal protection have been violated.

Plaintiff's contention that the state court may not dismiss her claim and assess costs once removal has been effected is based on 28 U.S.C. §1446(d) which provides:

Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and **the State court shall proceed no further unless and until the case is remanded.** Id. (emphasis added)

Federal courts have consistently held that the removal of an action to federal court divests the state court of jurisdiction to take further action. Pursuant to § 1446, "it has been uniformly held that the state court loses all jurisdiction to proceed immediately upon the filing of the petition in the federal court and a copy in the state court." Resolution Trust Corp. v. Bayside Developers, 43 F.3d 1230, 1239 (9th Cir. 1994); Moore v. Interstate Fire Insurance, 717 F.Supp.1193 (S.D. Miss 1989); South Carolina v. Moore, 447 F.2d 1067, 1073 (4th Cir. 1971). "Any further proceeding in the state court in the removed action, unless and until the case is remanded, would be a nullity." 1A Moore's Federal Practice § 0.168[3-8-4]. See also, Caldwell v. Montgomery Ward and Co., 207 F.Supp. 161 (S.D. Texas 1962).

The courts of other states have also interpreted Section 1446(d) to divest a state court of jurisdiction to proceed further upon the filing of a petition for removal. Pacific Spruce Corporation v. City of Yachats, 952 P.2d 575 (Or.App. 1998); Preston v. Allstate Insurance Company, 627 So.2d 1322 ( Fla. Dist. Ct. App. 1993); Sugimoto v. Exportadora De Sal, 284 Cal Rptr. 275 (Cal. Ct.App. 1991); Meyerland Co. v. Federal Deposit Insurance Co., 848 S.W.2d 82 (Texas 1993).

In a well reasoned, but unreported, opinion, this Court addressed a similar issue in Bolivar Sand Co. v. Allied Equipment Inc., 1987 WL 9375 (Tenn. App. April 13, 1987). In Bolivar the Defendant removed the case to federal court

following the trial court's denial of the Defendant's motion for directed verdict. After the filing of the removal petition, the trial court continued to hear the case in state court. The federal court eventually denied the Defendant's petition for removal and remanded the case back to state court. Thus, the question presented in Bolivar Sand Co. was whether the intervening actions by the state court were valid. This Court first determined that it was error for the trial court to proceed with adjudicating the case after removal was effected, holding:

The express language of § 1446(e) [sic] and its case law progeny reveal that once the removal is effected the state court will automatically be divested of jurisdiction and the federal court will then have the sole jurisdiction for determining the merits of the removal. The state court cannot proceed further "unless and until the case is remanded." Id. at *5

This Court then examined the effect of the federal court's later remand to state court. This Court determined that while earlier law allowed the state court to retain jurisdiction should the federal court remand for want of jurisdiction, § 1446 clearly provides that removal is effected upon completion of the procedural steps specified therein, irrespective of the ultimate determination on removability. Relying on a thorough examination of cases from other states and from federal courts, this Court held that the federal court's decision to remand did not validate the state trial court proceedings which took place between removal to and remand from the federal court. Most importantly for the instant appeal, this court held that the state court was without jurisdiction to proceed further once the action was removed. Based upon Bolivar Sand Co., and our review of cases from other jurisdictions, we are of the opinion there can be no question that a state court can proceed no further when a case is removed to federal court, unless and until the case is

remanded. The only remaining question is whether by dismissing the action and taxing costs, a state court has "proceeded" further. Other state courts have adopted the position that a dismissal is a proceeding under section 1446(d) and that, therefore, once a case is removed to federal court, a state court has no jurisdiction to dismiss the state court suit, unless and until the case is remanded. Pacific Spruce Corporation v. City of Yachats, 952 P.2d 575 (Or. App. 1998); Preston v. Allstate Insurance Company, 627 So.2d 1322 ( Fla. Dist. Ct. App. 1993); Sugimoto v. Exportadora De Sal, 284 Cal Rptr. 275 (Cal. Ct. App. 1991). The court in Sugimoto stated:

Thus clearly a dismissal with or without prejudice is a proceeding under section 1446(d). As such the dismissals here are not in accord with federal law and the trial court had no jurisdiction to make such orders. Sugimoto v. Exportadora de Sal, 284 Cal. Rptr. at 277.

Based on the foregoing authority, we find that the state trial court erred in dismissing the Plaintiff's action and assessing costs after the removal had been effected on June 26, 1998. The express statutory language of § 1446(d) and case law from multiple jurisdictions interpreting it compel the conclusion that once the removal is effected, the state court will automatically be divested of authority to proceed further and the federal court will then have the sole authority to take action. The state court cannot proceed further "unless and until the case is remanded." 28 U.S.C. §1446(d). The state court has no authority to dismiss a removed action and tax costs pending disposition of the removal or disposition of the lawsuit by the federal court.

While courts interpreting § 1446(d) have described the effect of removal as a divesting of jurisdiction from the state court, the language of §1446(d) does not include any reference to jurisdiction. It does, however, contain a clear and direct

prohibition against further proceedings by the state court. Thus, the effect of removal can be characterized as an automatic, statutorily-created stay on proceedings in state court. This characterization is helpful in anticipating and avoiding issues which might otherwise arise if the federal court remands a case after determining removal was improper. As the court in Sugimoto observed:

A "dismissal" and a "stay" are not the same. When a court orders a "stay", the action, although dormant, remains pending in that court. Following a "dismissal" the action is no longer pending. And even though the dismissed action can be refiled it must overcome additional procedural obstacles, including but not limited to, applicable statues of limitations.

284 Cal. Rptr. at 277.

The taxing of costs by the state trial court would be appropriate when the case is resolved. Such resolution could occur by determination on the merits by the state court if the federal court remands the case denying removal. Or, the federal court could dispose of the case on the merits. In either situation, the state trial court could then tax costs in the normal fashion.

Because we have reached our decision based on other grounds, we do not find it necessary to address the constitutional issues raised by the Appellant. The trial court's order dismissing this action and taxing costs to the Plaintiff is hereby vacated, and the cause is remanded to the trial court for such further proceedings, if any, as may be necessary and proper.

As a general rule, it is at this point in our opinion that we tax costs. We are not unaware of the paradox which could be perceived in this Court taxing costs where we have ruled that the trial court was without authority to tax costs. However,

this Court has jurisdiction to determine whether the trial court had authority to dismiss this action and tax costs to the Plaintiff and has exercised that jurisdiction at the request of Appellant. Although Appellant should be considered the prevailing party in this appeal, Appellee did not oppose the relief sought by Appellant and granted herein. Further, it would appear that the dismissal of Plaintiff's case and the attendant taxing of costs was done by the trial court on its own initiative without any request by Appellee. This Court is vested with wide discretion in the taxing of costs. Tenn. R. App. P. 40. We have carefully considered the unique posture of this case, as well as the equities involved. Based upon that consideration, we are of the opinion that the costs of appeal should be taxed equally to Appellant and Appellee. However, the costs of the trial court clerk normally included as costs on appeal shall not be taxed to either party.

PATRICIA J. COTTRELL, JUDGE

CONCUR:

BEN H. CANTRELL, PRESIDING JUDGE (M.S.)

WILLIAM C. KOCH, JUDGE